No. 5-5-114-663

Supreme Court of the United States.

No. 360.

CALVEN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY, AND PETER GEDDES,
Appellants,

VS.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

IN EQUITY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

Argument for Appellees

BY

JAMES T. SHIELDS,
GEORGE BROWN,
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SOLICITORS.

KNOXVILLE:
S. B. NEWMAN, STEAM BOOK AND JOB PRINTER.
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STATEMENT.

On February 11, 1852, the General Assembly of the State of Tennessee passed an Act, entitled "An Act to Establish a System of Internal Improvements in this State."

Acts of Tennessee, 1851–'52: Ch. CLI.

The construction of this legislation is the main and the controlling question involved in this contention, which, in the view of the eminently practical Judge who decided the cause in the court below, was one of easy solution. The intention of the Legislature is expressed in plain, direct, explicit words, and it would seem that diffused argumentation can not be of valuable assistance to the Court.

The reason of the statute, the cause which moved the Legislature to enact it, was to aid railroad corporations within the State in the work of constructing their roads.

The scheme by which this end was to be reached was that the State should make her own bonds, payable to bearer, and loan them to the corporations. For her own indemnity and to secure herself, a lien was created, and declared upon the property of the corporations, to attach as it should come into existence.

By Section 15 of the Statute it is made a public act, and by Section 12 the State of Tennessee ex-

pressly reserved the right to thereafter enact all such laws as might be deemed necessary to protect *her interests*, and *to secure her* against any loss in consequence of the issuance of bonds under this act, in such manner as not to impair the vested rights of the *stockholders* of the companies.

The bonds of the State were made, issued and sold, in accordance with this legislation; and in the years 1869-'70 the Legislature, in the exercise of the power so reserved, passed laws allowing the said corporations to discharge the indebtedness to the State which had thus accrued from them by the delivery of *any* of the bonds of the State without regard to series or number, of which legislation the East Tennessee and Virginia Rail Road, and the East Tennessee and Georgia Rail Road, now consolidated under the corporate name of The East Tennessee, Virginia and Georgia Rail Road, fully availed themselves.

There was still further subsequent legislation, under the provisions of which the insolvent roads, in the enforcement of the liens so reserved, were sold for the benefit of the State—one of which, the Cincinnati, Cumberland Gap and Charleston Rail Road Company, was purchased by the defendant in this cause.

Further legislation supervened, and which will be noticed in the course of the argument.

From the passage of these laws, down to a very recent period, there was a universal practical construction of them to the effect that the lien so created and declared was for the benefit of the State alone, and that the holders of the bonds of the State had no interest in it whatever, under

which construction, acquiesced in by the holders of the bonds themselves, rights and interests were acquired of various kinds, some of which embraced titles to entire roads and all their franchises and property.

But, it is now claimed by the appellants that they are holders of some of the bonds issued to the defendant, or to the roads represented by it; and that notwithstanding the plain, direct, explicit words of the original statute to the contrary; and notwithstanding the long practical construction, in which they have acquiesced, to the contrary; and notwithstanding the corporations to whom said bonds were issued have fully accounted to the State for the amount of the same, in consideration of which the State has in due form discharged said lien, and notwithstanding the State, as to the insolvent roads, has enforced said liens by sales of such roads under judicial proceedings, they are entitled to the full benefit of the said lien to secure the payment of the bonds held by them, and to have the same enforced by decrees in this cause.

Such, in brief, are the questions presented for adjudication.

ARGUMENT.

There is always a tendency to construe statutes in the light in which they appear when the construction is given. *It is easy to be wise after we see the results of experience.*

But, in endeavoring to ascertain what the Legislature meant, we must, as far as possible, *place ourselves in the light which the Legislature enjoyed, look at things as they appeared to it*, and discover its purpose from the language used *in connection with the attending circumstances.*

"To discover the intention of the Legislature, *look at the paramount object of the Legislature, and the means by which it proposes to accomplish that intent.*"

"In construing a statute, *we are to look at the state of things then existing, at the date of the passage of the statute, and in the light then appearing* seek for the purposes and objects of the Legislature in using the language it did."

Platt *vs.* Union Pacific R. R. Co., 99 U. S., 56, 60.

When the Internal Improvement law of the State of Tennessee, under the provisions of which these bonds were issued and sold, was passed, her government was orderly and stable: her resources very great; her faith unquestioned, and her credit equal, we may say, to the extent of the liabilities which she hereby contracted, to that of the general

government itself. Up to the passage of the Internal Improvement law, the State of Tennessee had never defaulted in the payment of interest on her public debt, and the straight bonds of the State, before and afterwards, sold at a premium. (See Record, pp. 1129, 1130.)

And when it was determined that the State should aid in the construction of the railroads then projected within her territory, by the use of her credit, in the form of her bonds, it was distinctly and positively agreed that the bonds of the State, and not the bonds of the roads indorsed by the State, should be issued; that the dealings of the road, in paying interest, and providing for the sinking fund, should be with the State alone; because experience had shown that the bonds of the State, "Straight State Bonds," as they were called, were in better demand than bonds merely indorsed by the State; and it was, *in fact*, the intention of all parties that the dealings of the roads should be with the State, and with the State alone. This arrangement, it was universally considered and understood, was perfected and accomplished by the legislation under which the bonds were issued and sold.

Dep. of S. Tate; Record, 967.

It appears fully and clearly that when these statutes were passed that the roads on which these liens were created had only an ideal existence; that their final success and ultimate value were matters of mere speculation, and that an excitement in relation to the construction of railroads, amounting, it may be said, to mania, was then prevailing in Tennessee. These corporations were

without credit. On the other hand, the State of Tennessee had almost unlimited and certainly unquestioned credit, and this her people, acting through the Legislature, were willing to extend in order that the construction of roads might be secured. What the value of the roads would be after construction, was unknown. It was certainly manifest that some of them would be of no value. When the bonds were sold the purchasers were ignorant as to which of the roads they had in fact been issued.

We submit that the plain, explicit language of these acts, read in the light of the state of things then existing, and as they then appeared, there can be no doubt that it was the intention of the Legislature that the lien created should be for the security of the State alone, and that it was not intended, or thought of, that the holders of the bonds should have any interest in it whatever. But, without seeking such aid, and taking the words of the statute, which are words of common use, "in their n tural, plain, obvious and ordinary signific tion nd import"—which is the fundamental rule of construction and interpretation—it seems cle r that it was intended to convey the idea to these corporations, and to all persons who might become purchasers and holders of the bonds of the State proposed to be made and issued, that the lien created and declared was to be for the sole use and exclusive benefit of the State, to be controlled, and, if need be, enforced by her alone, for her own indemnity and security.

These acts of the Legislature, the highest authority which the country acknowledges on earth.

when speaking within the pale of the Constitution, can not be questioned, or their authority controlled, in any court of justice.

The first section of the original Internal Improvement law provides for the issuance of certain bonds to the East Tennessee and Virginia Railroad company. It is expressly provided that the bonds so to be issued, be the coupon bonds of THE STATE OF TENNESSEE. The Governor is made the agent of the State to issue the same. The President of the corporation is vested with the power and charged with the duty of designating the place of payment of the bonds, which are to bear six per cent interest, payable semi-annually, and which are to have not more than forty nor less than thirty years to mature.

But it is provided that the bonds shall not be issued until after certain specified good and solvent subscriptions for the capital stock of the company shall have been made; and not until certain specified work on the road of the corporation shall have been done on a certain specified section of thirty miles thereof, and not until after it shall have been made to appear that said section is subject to no lien whatever "other than those created IN FAVOR OF THE STATE by the acts of 1851--'52," reference being here made to certain liens which had been created and declared in favor of the State, in an act which had been passed on January 15, 1852, known as the Bridge Act, and to which for the purposes of construction we shall again refer; and it is provided that the performance of these conditions precedent to the issuance of the bonds shall be ascertained, proved and determined by the en-

gineers and President of the corporation and the Governor of the State, who are thereby made the agents of the State, for these purposes, in the execution of the statute.

In presenting this summary of the provisions of the law we are particular and solicitous to show what instruments and agencies are provided for its practical execution, which, as will appear in the course of the development of the cause, is a matter of the first moment.

The second section declares and limits the purpose—the sole purpose to which the bonds are to be appropriated. This is declared to be the purchasing of the rails and other irons, the putting down of the same, and the procuring of the necessary equipments for the said section of the road. The Governor, the agent and officer charged with the duty of issuing the bonds, is restrained from doing so otherwise than upon the affidavit of the President, and a resolution of the board of directors the corporation that they shall be used for no other purpose. Finally, by the express terms of this section, the Governor is vested with power to appoint an agent of the State, styled a commissioner, whose powers and duties in the execution of the statute are defined in these words: "To act under oath IN CONJUNCTION WITH SAID PRESIDENT IN NEGOTIATING SAID BONDS, for the purposes aforesaid, and to act in any other matters pertaining to said company, where the interests of the State in the opinion of the Governor may require it."

The lien in question is created and declared in the two following sections, three and four. These sections, pretermitting some immaterial and mere-

ly repetitious words and phrases, are in these words:

That so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, *they* shall constitute a lien upon said section so prepared as aforesaid, and THE STATE OF TENNESSEE, UPON THE ISSUANCE OF SAID BONDS AND BY VIRTUE OF THE SAME SHALL BE INVESTED WITH SAID LIEN OR MORTGAGE, without a deed from the company, for the payment by said company of said bonds, with the interest thereon as the same becomes due.

That when said company shall have prepared as aforesaid a second section, or any additional number of sections of twenty miles each of said road, connected with a section already completed as provided in the first section of this act, and the Governor shall be notified of the facts as before provided, he shall in like manner issue to said company like bonds of the State of Tennessee to an equal amount of that before issued under the first section of this act, for each and every section of twenty miles of said road so prepared as aforesaid, but upon the terms and conditions hereinbefore provided, and UPON THE ISSUANCE OF THE SAID BONDS, THE STATE OF TENNESSEE SHALL BE INVESTED WITH A LIKE MORTGAGE OR LIEN, without a deed from said company.

AND WHEN THE WHOLE OF THE SAID ROAD SHALL BE COMPLETED, THE STATE OF TENNESSEE SHALL BE INVESTED WITH A LIEN, without a deed from the company upon the entire road, with all its property, for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds.

And after the Governor shall have issued bonds for the first section of the road, it shall not be lawful for said company to give, create, or convey to any person or persons, or body corporate whatever, any lien, incumbrance or mortgage of any kind which shall have priority over, or come in conflict with THE LIEN OF THE STATE HEREIN SECURED, and any such lien, incumbrance, or mortgage, shall be null and void as against said LIEN OR MORTGAGE OF THE STATE, and the said LIEN OR MORTGAGE OF THE STATE shall have priority over all other claims existing or to exist against said company.

These are the substantive provisions of the statute, which create and declare the lien, to spring into existence, and to become a vested right in the State, and to fix itself on the property of the corporation, on the issuance and delivery of the bonds of the State.

The remaining sections are remedied in their nature, but the language and provisions employed and contained, are of great significance as to the true intent and meaning of the Legislature. They were intended, to use the emphatic language of one of the sections, "to secure THE STATE against any loss in consequence of the issuance of the bonds under the provisions of this act."

In order to fully show the force and bearing of the provisions of the next section, five, we will here state the fact that in the year 1838 a b nk was established by the Legislature, in the name and for the benefit of the State, to be known under the name and style of the B nk of Tennessee, and which was the property and the fiscal agent of the State.

The provisions of this, the fifth section, relate to the payment of the semi-annual interest on the bonds.

It is made the duty of the corporation, to which bonds under the act were to be issued, to deposit in the bank of Tennessee, at least fifteen days before the interest becomes due, from time to time, an amount sufficient to pay the same, or satisfactory evidence that it has been paid or provided for; and on their failure to do so, it is made the duty of the Comptroller to report the fact to the Governor, whose duty it becomes thereupon to place

the property of the corporations so in default in the hands of a receiver or receivers, of his own appointment, bonded as therein required to the State of Tennessee, to receive the rents, issues, profits and dividends of said property, and appropriate the same under the direction of the Governor, towards the payment of the said interest. The Governor is armed with the power to aid the receivers by issuing to the sheriff writs of possession, whose duty it is made to execute the same; and the receivers are to remain in possession, accounting and settling with the Comptroller, and paying net balances INTO THE TREASURY OF THE STATE, until all interest in arrear is paid.

These are the provisions made for the enforcement of her lien by the State for the payment of the semi-annual interest on her bonds issued to her railroad corporations under the provisions of her Internal Improvement law. But, it was apprehended that these provisions might in some instances be ineffectual, and to meet this contingency, a final provision was made in the said fifth section in these words:

The Comptroller is authorized and it is made his duty, upon his warrant, to draw from the Treasury any sum of money necessary to meet the interest on such bonds as may not be provided for by the company, as provided for in this act, and the Comptroller shall report thereof to the General Assembly from time to time.

The law provides for the happening of what it must have been manifest to every one would certainly transpire, to-wit: the failure of at least a portion of the railroad corporations to pay the principal of the bonds for the State, or to furnish her with the means of doing so. Further, it was

certainly within the range of possibility, if not probability, that some of these corporations, though they should be able, might REFUSE to pay the bonds, and this was also a contingency to meet which a precedent forecast required that provision should be made. These provisions are all made in the sixth section of the statute. They are provisions for the final enforcement of her lien by the State, by the use of certain special and anomalous proceedings, in her own courts. It is enacted as follows:

"That if said company shall fail, or refuse, to pay any of said bonds when they fall due, it shall be the duty of the Governor to notify the Attorney General of the district in which is situated the place of business of said company, and he shall forthwith file a bill against said company IN THE NAME OF THE STATE OF TENNESSEE, in the Chancery or Circuit Court of the county in which is situated said place of business, setting forth the facts, and thereupon said court shall make all such orders and decrees in said cause as may be deemed necessary by the court *to receive* the payment of said bonds with the interest thereon, and TO INDEMNIFY THE STATE OF TENNESSEE AGAINST ANY LOSS ON ACCOUNT OF THE ISSUANCE OF SAID BONDS by ordering said road to be placed in the hands of a receiver, ordering the sale of said road, and all the property and assets attached thereto, or belonging to said company, or in such other manner as the court may deem best for the interests of the State."

But it was wisely deemed proper to still further secure and protect the interests of the State, and this was done by certain provisions for partial repayments of the loan of her bonds to be made at stated times before and in anticipation of the maturity of them. These provisions are contained in the seventh section of the law, known as the Sinking Fund clause of the Internal Improvement law. It contains provisions that have a most cogent

bearing on the question of the intention of the law, and, as it is brief, we here present it in full:

"That at the end of five years after the completion of said road, said company shall set apart one *per centum per annum* upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the treasury of the State, after assigning them to the Governor, and for which the Governor shall give said company a receipt, and as between the State and said company, the bonds so paid in, shall be a credit on the bonds issued to the company. And the bonds so paid in and the interest accruing thereon, from time to time, shall be held and used by the State as a Sinking Fund, for the payment of the bonds issued to the company, and should said company repurchase any of the bonds issued to it under the provisions of this act, they shall be a credit as aforesaid and canceled. And should said company fail to comply with the provisions of this section, it shall be proceeded against as provided in the fifth section of this act."

And we will here, in connection with this section, state an arithmetical fact, patent on the face of the section, and to be again commented on in the course of the argument, which fact is this:—the payment here provided for of one PER CENT. PER ANNUM, authorized to be made in ANY of the bonds of the State of Tennessee, managed according to the principles and rules that are generally applied to a sinking fund, would very nearly extinguish the whole of the liability on account of the said bonds. This will hereafter be more fully and accurately considered. It is here mentioned because it is so obvious on the face of the section that it may be well said to constitute a part of its provisions.

The last provision that we will here state, though there are several others to which we will hereafter direct attention, is the one contained in the twelfth

section, by the terms of which, saving the vested rights of stockholders, and of stockholders only, unlimited powers in regard to the remedial provisions of the statute are expressly reserved to the State, to be exercised in the discretion of future Legislatures, of which notice was given to all the world by section fifteen, as before stated. We especially solicit attention to, and consideration of, this section, because it is important not only as authorizing certain subsequent statutes, directly to be stated, but as being most significant of the intention of the statute of which it forms a component part. It is in these words:

> "That the State of Tennessee expressly reserves the right to enact by the Legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interests of the State, and to secure the State against loss in consequence of the issuance of bonds under the provisions of this act. But in such manner as not to impair the vested rights of the stockholders of the companies."

Such are the provisions of the statutory contract under which the Internal Improvement bonds of the State of Tennessee were issued. In their terms they authorize the issue of none other than the simple bonds of the State, resting upon the faith of the State alone, and in that form they were made, authenticated and negotiated. The name of no one of the corporations to which they were issued appears on any part of them as surety, endorser or guarantor, or to indicate to which of the corporations the particular bond was originally issued. In the somewhat cant but expressive language of some of the witnesses, they were all made "straight" State bonds, with THE DIRECT INTENT that they should be so made, because they were

preferred by the purchasers of bonds to any others, and because the corporations to which they were issued and loaned desired no other creditor than the State of Tennessee. And the bonds of the State, thus issued, were negotiated, without regard to, or knowledge of, the particular corporations to which they had been loaned, with the express understanding that there was no security for their payment other than that which appeared on their face, often commanding a premium, those of them which had been loaned to the most unpromising commanding as high a price in the market as those which had been loaned to the roads of the most assured success and final prosperous issue.

But the State of Tennessee in respect to these, her bonds, is now in arrear and in default; she has failed, and still fails to meet and perform her undertaking so clearly expressed on the face of the contract. Interest has accrued which is unpaid, and payment of the principal, when it shall become due, is questioned and doubted. When the bonds were negotiated and purchased there was no reason for apprehension of so deplorable a result. It was not within the range of human prescience to foresee, nor, if foreseen, could any human forecast have provided against the consequences of the gigantic civil war which has supervened. But it is now a matter of public history that with such a calamity the country was afflicted, and that when the struggle was ended the once powerful State of Tennessee lay prostrate in the ruin of all her material interests. She, as a consequence, was then unable to meet her obligations, but the obligations, nevertheless, remained; and, with her vast resources, and

great recuperative energies, is it out of place to here express the hope, that with returning prosperity returning justice will come, and, lifting aloft her scale, redeem her pledged faith and preserve unimpaired her honor and good name.

But the holders of the bonds not being so hopeful, or not being endowed with that patience which the circumstances would seem to require, and permitting self-interest, for the time, to obtain an undue dominion, now seek by legerdemain of construction to depart from their own original contract, and substitute to the place of the State, the only obligor known in that contract, but which is not within the reach of the arm of the judiciary, another obligor, which neither in law or morals is under any obligation to them whatever. The theory of their proposition involves the idea that an individual citizen may be held to meet and discharge the obligations of the government. It has not even the moral support that an indebtedness due from the individual to the government would give such a proposition; for, as fully appears in the evidence, the party sued, long before the institution of the suit, repaid the State, to the uttermost farthing, what was due to ner on account of the loan of bonds by her to it. It is, in short, an attempt, in its practical effect, whether so intended or not, to make one party pay the debt of another, and leaving the indemnity of the former to the uncontrollable discretion of the latter.

The complainants bring this bill against the East Tennessee, Virginia and Georgia Railroad Company, claiming to be BONA FIDE holders of a number of the identical bonds which were issued and

loaned to the East Tennessee and Virginia Railroad Company, to which the former has succeeded, and as such claim that they have the right to have the said lien enforced against the property of the defendant.

It is assumed in substance as follows:

1. That in respect to the bonds which the complainants hold, the East Tennessee and Virginia Railroad Company was, and the defendant now is, their primary debtor; that the said lien was intended to secure the payment of the interest and principal of said bonds directly to them, and being vested in them, they are entitled to a standing in court, in their own names, and in the absence of the State, to have the same enforced.

2. That if the said lien is vested in the State of Tennessee, it is so vested *in trust* for them, and that the trust can and should be enforced, at their suit, in their own names, not only in the absence of the trustee, but contrary to, and in defiance of her will

We quote from the bill:

"Your orators charge that under and by virtue of the provisions of the general Internal Improvement law of February 11, 1852, the State of Tennessee was only *secondarily* liable for the bonds loaned by it to the East Tennessee and Virginia Railroad Company, and that the said company was *primarily* liable under the provisions of said act for the payment of the principal and interest of the said bonds."

"Your orators further charge that by the terms of the general Internal Improvement law of February 11, 1852, the State of Tennessee constituted herself the trustee for whomsoever might become the holders of the bonds loaned to the several railroad companies named in the act. The terms of that trust were defined and set forth in the statute."

"By the acceptance of the bonds, and the use of their proceeds by the East Tennessee and Virginia Railroad Company, a mortgage lien attached to the property of the company, without a deed from the company, and the conditions of that mortgage were as prescribed in the statute. By the

purchase of said bonds, the holders thereof became entitled by contract to the lien rights set forth in the Internal Improvement law."

"Your orators likewise show that by virtue of their rights in equity as lien holders, and the terms of the statutory mortgage above described, they are entitled to have the possession of the East Tennessee and Virginia Railroad, secured by a receivership, for the benefit of the holders of the Internal Improvement bonds aforesaid, loaned to the East Tennessee and Virginia Railroad Company, and for the payment of the interest thereon, for which the said company became bound. The receiver, or receivers, so to be appointed, should apply the revenues of the property to the payment of the overdue interest on said bonds."

And it is charged that, for certain reasons which are stated, that the complainant is unable to obtain any action on the part of the State of Tennessee, or her officials, for the execution of the said alleged trust.

We deny the existence of any such rights as are here asserted.

There are in the contract, or statute, no words, phrases or provisions that are affirmative of any such rights or equities. The demand of the complainants is an attempt, by subtle and artificial construction, to create, establish and enforce a right —a new right—that has had no previous existence, neither in the natural, plain, obvious and ordinary signification and import of the words of the statute, nor in the actual intention of any of the parties to the contract.

The statutory contract, contained in the Internal Improvement law, is expressed in plain, direct, ordinary and simple terms, and, read as a Court

reads it, not as by a party seeking to maintain a newly conceived idea, is simply this:

The State of Tennessee, in consideration of the public good, which it was supposed would be promoted by the completion of the railroads in the course of construction within her territory, agrees on her part to lend money in the form of her own convertible, negotiable bonds to her railroad corporations to be used for that purpose, provided the said corporations, on their part, will agree, in consideration thereof, to pay into the treasury of the State the necessary means to discharge the obligations which the State would thereby incur, or meet them for her, at their election, by direct payment, and secure the performance of the contract on their part, by a mortgage on their property, to be enforced and foreclosed by certain special summary proceedings, to which contract the State and her said railroad corporations were the only parties.

When the bonds were issued and delivered the assent of both parties was given and he contract was completed; the title to the bonds was thereby instantly vested in the corporations, and the lien on their property was instantly vested in the State. Therefore, the lien was vested in the State, in full force and effect, before the bonds were sold by the corporations, and, as a consequence, before the subsequent purchasers had any interest in them, or rights founded on their possession, whatever.

But, when the bonds were afterwards sold another contract supervened and came into existence, to which the State and the holders of its negotiable bonds were the only parties. This con-

tract was evidenced by the terms of the bond, AND NOT OTHERWISE. The whole of this contract was expressed on the face of the bonds. It was simply the promise of the State to pay the holders of the bonds the amount of money expressed on their face, with the interest thereon, at the times and places there stipulated. This is the only evidence of a contract with which the holders of the bonds have any privity, or with which they have any concern. The engagement of the State with them was deliberately put into writing, in terms that import a legal obligation, without any uncertainty as to the object or extent of the obligation, and it is presumed that the writing contains the whole of the contract.

The charge that the corporations were and are the primary debtors, and that the State is only secondarily liable, is repelled on the very face of the contract which is brought into court by the complainants.

Nor are these charges and propositions, that the defendant is their primary debtor in respect to the bonds which they hold, and that the State of Tennessee in respect to said lien is merely a trustee for them, made and insisted upon by the complainants, to any extent supported by the statute.

We maintain that the holders of the bonds are utter strangers to the statutory contract, and have no right to any benefit of any of its provisions—that, in short, on no ground, on no principle, on neither those stated in the bill, nor any other, can the provisions of the said contract be made to inure to the benefit of the complainants.

The statute, as we have said before, does not contain a simple affirmative word or provision that tends to sustain any of these propositions. It is nowhere affirmed that the lien is for the security of the future holders of the bonds. It is in no part of the statute expressed that the State is to hold the lien as a mere trustee for the use of the future bond-holders. No right, or equity, of any kind, is secured to them in terms. Now, if such had been the intention; if the State of Tennessee, at that time, had doubted her own solvency, present or future; if she had intended to protect her own creditors against her own bad faith, and to have given them a vested interest in the lien which was being fixed on the most cherished property under the dominion, would it not have been so expressly provided in the contract? On the other hand, under such a state of affairs, would not the purchasers of her bonds themselves have so required, before investing in her securities, if there had been any such intention? Would anything have been left for implication?

The sections creating the liens do not in terms vest it for the use of the bond-holders.

The sections providing remedies for the enforcement of the lien, and the foreclosure of the mortgage, do not provide that these be put in motion at the instance, or on the application, of the bond-holders.

Nor does the statute contain a single express exception, or reservation in their favor. If any such intention had existed, the expression of it in terms was most strongly called for in drafting the twelfth section. By that section, it will be remem-

bered, large powers are expressly reserved to future Legislatures—the power to legislate in their discretion for the protection of the interests of the State; "but," reads the last sentence of the section, "in such manner as not to impair the vested rights of the STOCKHOLDERS of the companies." There is no exception in favor of the vested rights of the bond-holders, for it was not contemplated, nor intended that they had, or should have any such rights.

We repeat in neither of the twenty sections of the act is any right, equity or interest, in the said lien, or power over, or in relation to the remedies provided for its enforcement, in terms vested in, given to, or recognized as existing, for the benefit of the future holders of the contemplated bonds.

Then, in the absence of any such express provisions, and in the face of, and in defiance of, the most cogent presumption that springs from the fact that the statute contains no such express provisions, are the terms and language which are to be found in the statute susceptible of such a construction as will support the case that is attempted to be made?

The object and purpose of construction is to ascertain the real intention, whether the writing be a statute, or a contract, and the one now under examination is both.

The words used, if of common use, are to be taken in their natural, plain, obvious and ordinary signification and import, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation: 1 Kent, 462.

The only words to be found in any of the sections of the statute that give any color even for such a construction occur in the first clause of the third section. They are these: "So soon as the bonds of the State shall have been issued, for the first section of the road as aforesaid, THEY shall constitute a lien upon said section," &c. Words of like signification do not again occur; but words of exactly an opposite meaning occur and are afterwards repeated in the same and other sections. These words are merely introductory of the subject of the lien, and occur, as we have said, in the first clause only, of the section that creates and defines the lien. They can not control the words that immediately follow, and which express the intent IN FULL. They are these: "AND THE STATE OF TENNESSEE, UPON THE ISSUANCE OF SAID BONDS, AND BY VIRTUE OF THE SAME, SHALL BE INVESTED WITH SAID LIEN OR MORTGAGE, WITHOUT A DEED FROM THE COMPANY, for the payment by said company of said bonds, with the interest thereon as the same becomes due;" and these words constitute the last and final clause of the section, and are the final expression of the ultimate will and intention of the Legislature.

In the next, or fifth section, it is again declared in express terms that the lien shall attach on the ISSUANCE of the bonds. The precise words used here are these: "upon the ISSUANCE of the said bonds the State of Tennessee shall be invested," &c.

It is entirely plain that it was intended that the lien should attach upon the ISSUANCE of the bonds. The word ISSUANCE, as used in the statute, is of

equivalent signification to that of the word LOAN. The obvious sense and meaning of the two clauses is that when the loan was completed by an actual DELIVERY or ISSUANCE, of the bonds, to the corporation, the lien shall attach to its property.

The word, issuance, is here used as the name of an act to be done, the act of issuing, or giving out, and, clearly is intended to signify the act of issuing, or giving out of the bonds: (Webster); and the word ISSUE, in mercantile and business usage, and also in its popular signification, has a reference to money, or its representative, whether in the form of bank notes, negotiable bonds made for circulation, or other form, and, when used as a noun, means money, or its representative; when as a verb transitive, "to send out, to put into circulation; as to issue money from a treasury, or notes from a bank." Webster.

The words, "by virtue of the same," in the last clause of section third, do not refer to the words "bonds," or "said bonds," alone. They admit of no such forced and limited construction. They refer not to the thing, but to an act to be done in relation to the thing. The lien is not to attach to the bonds, but "the State of Tennessee, UPON THE ISSUANCE of said bonds, and, by virtue of the same, shall be invested with said lien or mortgage"—that is, UPON the happening of the fact, UPON the specified ACT being done, or accomplished.

The rule is, what is at the end of a phrase commonly refers to the whole phrase, and not only to what immediately precedes it, provided it agrees in gender and number with the whole phrase:

Pothier on Obligations, —; Dwarris, Potter's ed., 217.

But, if there were any doubt as to the meaning of the Legislature, it would be entirely removed by the clause in the fourth section. The words, "by virtue of the same," are omitted in that clause, and it is emphatically declared that the lien shall attach "UPON the ISSUANCE of the bonds."

It is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together: Marshall, C. J., 12 Wheaton, 332. Taking these expressions and clauses all together it can not be doubted that it was the loan, issuance and delivery of the bonds to the corporations that was to fix the lien on their property.

But, to return to the first and introductory words of the first clause of section third, and contrary to the rule of law and the rule of reason, examine it singly and separately, it does not permit of the construction contended for by the complainants.

"So soon as the bonds of THE STATE shall have been issued for the first section of the road as AFORESAID, THEY shall constitute a lien upon said section," &c. Now, suppose there were no subsequent words and clauses fully explaining, expanding and moulding into its final form and shape the lien here mentioned, what would be the obvious meaning and intention of the words? The issuance of the bonds is provided for in the two preceding sections—they are to be the bonds of the State of Tennessee—they are to be loaned to the corporation—to these provisions reference is expressly

made by the use of the phrase, "as aforesaid"; now, upon a fair, a reasonable construction, for what purpose is the lien to attach to the property? In whom is the lien intended to be vested? Can it be doubted that the purpose, the sole purpose and object of the lien is to secure and indemnify the State, and for that purpose, that it was the intention to vest the lien in the State? Thus, TAKING THE CLAUSE BY ITSELF, and if taken by itself for one purpose, it must be so taken for all purposes, it CONTAINS NO PROVISION, STIPULATION, OR AGREEMENT, THAT THE CORPORATION IS TO PAY THE BONDS FOR THE STATE. It, and the clauses to which it refers, simply provide for the loan of the bonds of the State to the corporation. The only possible consequences are a liability of the corporation to the State, and a liability of the State to the holder of the bonds when sold. It follows, thus taking the clause, that the lien must be intended to secure the debt TO THE STATE due from the corporation. It can not be that it is intended to fix a lien in favor of the holders of the bonds, for they have no right whatever to look to the corporation for the PAYMENT of them—nor has the State, because the only undertaking of the corporation to her is to repay to her THE MONEY loaned in the form of the bonds.

Such, we insist, would be the only reasonable construction of the first clause of section third if it stood alone. But the Legislature did not leave this important interest exposed to the perils of construction, and, as we have seen so clearly expressed its intention in the latter part of the clause, and in the subsequent clause in the fourth section as to leave no room for construction; for, as is said in

Fisher vs. Blight, 2 Cranch, 358–399, "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

But, before leaving the discussion of the question of the construction of the words and phraseology of these sections, we wish to direct attention to the often repeated direct vestiture of the lien in the State of Tennessee. As we have seen by the terms of section three, it is so expressly vested, and also by the clause in section four, declaring that it shall attach upon the issuance of the bonds. But section four contains three other express declarations and recitals to the same effect. In declaring the final lien, to attach upon the whole road, and all its property, after completion, it is in terms vested in the State of Tennessee, without any qualification, or declaration of use, and absolutely. No trust is declared. If a trust had been intended, it would have been declared in express terms. If it had been intended that the State should hold the lien or mortgage, on this peculiar property, so much valued, so much cherished, to create which so much sacrifice was being made, and from which such vast results to the prosperity of the whole State were confidently expected, IN TRUST, for the holders of her bonds, utter strangers to her interests, dispersed throughout the world—to hold it as a mere naked trustee, such an intention, in a matter of this vast magnitude, would not have been left to implication.

And here we wish to direct attention to a well

settled principle of construction applicable not only to this particular question, but to others, and to which we shall again refer. It is is: IT IS ALWAYS PRESUMED THAT THE LEGISLATURE, WHEN IT ENTERTAINS AN INTENTION, WILL EXPRESS IT, and THAT, TOO, IN CLEAR and EXPLICIT TERMS: Potter's Dwarris, p. 219.

The effort is to raise an IMPLIED trust.

It is not insisted that there are any facts to raise a RESULTING trust, technically so termed, which is a trust resulting from THE ACTS of the parties, whether they so intended or not.

Nor is it insisted that there is any pretense for a CONSTRUCTIVE trust, or a trust arising from the existence of FRAUD in the issuance and purchase of the bonds, and can not be, for there was no such element in the transaction.

An EXPRESS trust, which is a trust resting on an EXPRESS agreement, finds no support in the record whatever. There is not the slightest evidence tending to establish such an agreement.

An implied trust rests upon contract, but not an EXPRESS contract. It is a trust that arises when one is not directly or expressly declared in terms, but when the court from the whole transaction, and the words used, IMPLY, or INFER, that it was the INTENTION of the parties to create a trust.

The complainants charge that "by the purchase of the bonds the holders thereof became entitled, BY CONTRACT, to the lien rights set forth in the Internal Improvement law," having previously charged that by the terms of the law the State of

Tennessee constituted herself a trustee for the holders of her bonds.

That the State of Tennessee did not so constitute herself in express terms is not a debatable proposition.

Then is there anything in the whole transaction and the words used from which the Court can IMPLY, or infer, such an INTENTION. The intention must exist in order to raise a trust, express or implied. If not expressed, and it can not be fairly implied, no trust can be raised.

It is upon the party alleging such a trust to prove the intention by cogent evidence.

In Cook vs. Fountain, 3 Swanston's R., 591, 592, it was said: There is one good, general and infallible rule. It is such a general rule as never deceives; a general rule to which there is no exception; and that is this—the law never implies, the court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the Chancery do once take the liberty to enforce a trust by implication of law, or to presume a trust unnecessarily, a way is open to the Lord Chancellor to construe, or presume any man in England out of his estate.

But this, says Judge Story, 2 Eq. Ju., sec. 1195, is, PERHAPS, stating the doctrine a little too strongly; and, he adds, "the more correct exposition of the general rule would seem to be, that A TRUST IS NEVER PRESUMED OR IMPLIED, AS INTENDED BY THE PARTIES, UNLESS, TAKING ALL THE CIRCUMSTANCES TOGETHER, THAT IS THE FAIR AND REASONABLE interpretation of their acts and transactions."

And when the idea of such an intention is absolutely excluded; when from an examination of the whole transaction and the words used it is manifest that in fact no such intention existed, for stronger reasons the court will not imply a trust. 1 Perry on Trusts, 115.

We have here, in connection with a consideration of the vestiture of the title to the lien, made and declared in sections three and four, thought it convenient and not out of order to refer to these general principles in relation to trusts. We will make the application as we proceed in the examination of the questions of construction upon the face of the statute.

The provisions for the payment of the semi-annual interest on the bonds of the State, and for the enforcement of the lien for that purpose, so declared in terms in favor of, and vested in, the State, made in the fifth section, are not only utterly inconsistent with the theory of the complainants, but show with indubitable certainty that it was contemplated that so far as the holders of the bonds were concerned the interest should be absolutely paid in any event. Such a provision is made in their favor as to absolutely preclude all necessity for any resort to the lien by them to enforce the payment of the interest to them; for, by the last clause of the section, it is declared that if the corporations do not voluntarily or under the coercion of the remedies there prescribed, furnish the State with the means of paying the interest, or otherwise provide for the same, THAT IT SHALL BE PAID OUT OF THE GENERAL TREASURY OF THE STATE. The question is not now whether the State has done

this, but what was the intention, WHAT WAS THE CONTRACT. The contract is a fixed entity—it is an irrevocable and unalterable agreement, and upon the true intent of the parties thereto, at the time it was made, their respective rights must now be ascertained and adjudicated. And when the plain, simple words of this section are read, informing us that the primary intention and scheme was that the corporations should DEPOSIT, not pay, in the hands of the fiscal agent of the State an amount sufficient TO PAY, that is to enable the State to pay, the said interest, with exchange and commissions, or, if not this, satisfactory evidence that said interest had been paid or provided for, that is, so as to relieve the State from paying the same; and that, if neither of these things be done, a right to a special and extraordinary remedy shall immediately accrue, not to the holders of the bonds, for they were to be otherwise absolutely provided for, but to the State, the party, and the only party aggrieved, to be made available to her, by name, upon and by the summary action of her own executive and ministerial officers, without invoking the aid of the judiciary; and that the amount due to the holders of the bonds is to be paid by the State, whether she obtains redress or not, absolutely and unconditionally; we say, when we read this clear, direct and unambiguous language, can we entertain the slightest doubt of the intention—is it not morally certain that it was intended that the State should be, as it was expressed and written upon the face of her bonds, the primary and sole debtor to the holders of the same—that she should in any event pay the interest on the same, and that the said lien

mary liability, and the irrevocable pledge of her own primary faith.

This is precisely what the position of the complainants is. There is no evading it. Section six declares a portion of the lien rights set forth in the act; the provisions of section six are a part of the contract with the corporations; the complainants say they are privies to this contract, and took the bonds under it, with the corporations as their primary debtors, and then in a subsequent section in terms charge that "by the purchase of the said bonds, the holders thereof became entitled, BY CONTRACT, to the lien rights set forth in the Internal Improvement law," and bound themselves, it irresistibly follows, to look, in the first place, to such debtors, and to such property, and to depend on such remedies as we have mentioned, and then, as a finishing measure in this monstrous financial scheme, they placed the whole in the discretion of a trustee beyond the reach of the law.

A construction so absurd, so contrary to reason, would not be tolerated even if the language used were capable of being tortured in that direction. No words, unless so clear and explicit as to preclude all construction, would be allowed to have this force and effect, for "the intention is to be taken and presumed according to what is consonant to reason and good discretion:" 1 Kent, 462.

If the State of Tennessee could be impleaded, and were before the Court, insisting upon such a construction of her contract—insisting, contrary to the face of her bonds, that she was only secondarily liable—that she intended these lien rights for the benefit of the holders of her bonds, and that they

were under the contract bound to exhaust them before looking to her, what would be the answer of her bondholders?—what would be the answer of the law? It would most assuredly be, the contract is plainly written to the contrary; it is so written in the bonds, and it is so written in the statute; and, besides this, the construction for which you contend is at war and inconsistent with all the facts and circumstances; it is not consonant to reason, and would lead to palpable injustice, contradiction and absurdity: Kent, p. 462.

If it had been intended that the holders of the bonds should have an interest in the lien, it would have been so expressed in these remedial sections. There would have been some provision authorizing some action on their part—providing that the machinery of the law should be put in motion at their instance. But the provisions are all for the benefit of the State alone. The holders of the bonds are treated as strangers to them. The attention of the Legislature was directly fixed upon the lien and its enforcement, and a special, extraordinary remedy, statutory and not according to the course of the adjective and remedial provisions of the general law of the land was provided and prescribed, and vested in the State in her own name. It is a general maxim, that "the express mention of one thing implies the exclusion of another." It is a general rule that a specific statutory remedy is to be regarded as exclusive. (1 Redfield on Law of Railways, 334, 335 and notes.) It is a rule of almost universal application, in interpretation, before cited, that "it is to be always presumed that the Legislature when it entertains an intention

will express it, and that, too, in clear and explicit terms." (Potter's Dwarris, 219.)

The maxims which govern the exposition of contracts are simple and consistent, and well calculated to effect their sole object; namely, to do justice between the parties by enforcing a performance of their agreement, according to the sense in which they mutually understood it AT THE TIME IT WAS MADE. (Chitty on Contr., 73). Intention, says an ancient writer, is the queen or empress of the writing. It must prevail. If it be departed from one tittle, the Court assumes to contract for the parties, or in the case of a statute, ceases to be an expounder, and becomes a legislator and a lawgiver. The rule is universal, because its foundation is laid at the very bottom of reason, of common right and primary justice, that the intention, if lawful, must and shall prevail in the construction and enforcement of a contract, a statute, or a will. It is to be defeated by no forced or artificial reasoning; it is not to be obscured or perverted by any mystery of logic, or affectation of profound learning, or profound and incomprehensible ratiocination. There is no necessity for any such affectations, and when in the weakness of vanity they are resorted to, absurdity and injustice are the usual consequences. As a rule, is no difficult task for plain reason, in the search of truth, to discover the true, real intent and meaning of a statute, or contract, expressed in the plain, simple, ordinary language of common life. Looking to the subject matter, to the facts, to the things agreed to be done, to the things stipulated not to be done, standing in the position which the parties occu-

pied, and giving the words which they used, that signification, which according to all the authorities, whether found in judicial determinations, in the writings of the great and authoritative commentaters both on the law and on morals, should be given to them, namely, their natural, plain, obvious and ordinary signification and import, neither unreasonably restricted or enlarged; (Story, J., in Martin v. Hunter, 1 Wheaton, 326; 1 Kent, 462); so that, to use the language of Vattel, such sense may be given the act as the parties must naturally have understood when it was prepared and accepted.

Now, can any one honestly in search of the very truth of the matter, come to the conclusion that it was intended that the specific bonds which were issued to the defendant should constitute a lien on its property, to be vested in the holders of them, and constitute a vested, continuing lien in their hands, when he reads the plain words of the seventh section of the Internal Improvement law, giving to the defendant the absolute and unqualified right to purchase ANY other bonds of the State, and pay them into the treasury of the State, in absolute discharge of its liability on account of the said specific bonds so issued to it? Such is the clear, plain, unmistakable provision of this section, under the operation of which, as we have stated, it is an arithmetical fact, the whole amount of the defendant's said liability could have been discharged before, or about the time, of the maturity of the bonds so issued and loaned to it under the said law.

It matters not whether the defendant complied with, or availed himself of this requirement, or

provision. That is not the question. The question is, what intent is thereby manifested? We answer, and common reason answers, the intent not only manifested, but absolutely morally demonstrated, is that the said lien should be the absolute property of the State, under her own exclusive dominion as her private property, to be discharged by her in manner and form as there provided.

It can not be presumed that the Legislature intended to vest a right, and to them, in a subsequent section of the same act make a provision, the positive, direct and inevitable effect of which was to defeat that right. Nor can a party be allowed to rely upon one part of, or one provision in, his contract, and reject all the others.

It is an ancient and well settled rule that the whole statute or contract is to be taken together, and to be examined, to arrive at the intent. The rule has been repeatedly affirmed. In Pennsylvania it has been held that in construing any part of a law the whole must be considered; the different parts reflect light on each other; and, if possible, such a construction is to be made as will avoid any contradiction, or inconsistency. (1 Benny, 601.) So in Massachusetts it has been said that in putting a construction upon any statute every part shall be regarded; and it shall be so expounded, if possible, as to give some effect to every part of it. (7 Cushing, 53, 89.) So again in Michigan it has been decided to be a cardinal rule that in the construction of a statute, effect is to be given, if possible, to every clause and section of it; and, it is the duty of courts, as far as practicable, so to reconcile the different provisions as to make the

whole act consistent and harmonious. If this becomes impossible, then we are to give effect to what was manifestly the intention of the Legislature, though by so doing we may restrict the meaning or application of general words: Attorney General vs. Detroit and Erin Plank Road Comp., 2 Michigan, 138.

Now, the simple proposition of the complainant is, upon the construction of the language of the statute, that the words of the first clause of the first sentence of the third section, "that so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, THEY shall constitute a lien, should control the construction. The words are not yet only, as we have shown, utterly inconsistent with the more full and explicit language that immediately follows in the same sentence, but are absolutely repugnant to the stipulations and provisions contained in nearly every one of the other nineteen sections of the act. If this construction is allowed it will operate as a repeal of nearly all of the other substantive and remedial provisions of the statute. But to construe the said words in accordance with the obvious meaning and intention of the words that immediately follow them, and which were plainly intended to express in full the intention of the Legislature, the act instantly becomes one consistent and harmonious whole.

The provisions made in section thirteen against the fraudulent issue of bonds are as incompatible with the idea of a fixed vested lien in the holders of the bonds which were properly issued as are the

then to believe that it entered into the minds of the purchasers of the bonds that it was intended that they should have an interest in this lien; or, that they would, had it been so intended, and this to the extent of making the railroads their primary debtors, have invested one dollar in such bonds, with an absolute power in the party secondarily liable only, to make such disposition of the property on the assurance furnished by which they were investing their money, as she might deem necessary to the protection of her own interests without any regard to theirs? Would capital, ever cautious, timid and prudent, have thus exposed itself to all the perils of thirty or forty years of modern American legislation? In short, we earnestly maintain that the construction which the complainants seek to have forced upon the third section is irreconcilably inconsistent with the unavoidable meaning of the language of section twelve. And, further, the exception in favor of the vested rights of the stockholders, too strongly implies that no other vested rights existed, to admit of any serious debate. The sacred inviolability of vested rights was manifestly in the mind of the Legislature, and if there had been an intention that such rights, under the act, had been, or were being vested in the purchasers and holders of the bonds, they also would have been expressly excepted.

So the contract was written, and such was the intention of its several provisions. We are the more confident that our views are correct and sound because they are in perfect accord with what before the act was passed was the scheme and design of its procurers—because they are in accord

with the views and intentions in fact of the members who composed the Legislature by which it was passed—because, as we shall fully show under another head, they are in accord with the universal interpretation and understanding of all men down to a very recent period.

And if we are correct, if such were the real intention at the time the statute was passed, and the contract entered into, it must so stand unaltered, unimpaired in its integrity, and the rights which have been acquired under it are under the protection of the organic law itself. No change of circumstances, no new interests springing from supervening events, no disappointed expectations, can be allowed to affect the obligation of the agreement. The defendant has the right in morals and law to stand upon the terms of the contract as it was made and mutually understood by the parties at the time. It was the will of the Legislature of the State of Tennessee, embodied in a statute that is conceded to be free from all constitutional objection; and the Legislature acting within the pale of the Constitution, is the highest authority known to the law, and its will must be obeyed as being absolute and uncontrollable.

The complainants can not by the face of the bonds which they hold successfully maintain their position that the defendant is their primary debtor. There is no express provision in the statute under which the bonds were issued that so declares. The many provisions in the statute are all utterly and irreconcilably inconsistent with the position. These provisions are all as inconsistent with the idea that the lien was in any way, or to any extent, to inure

to the benefit of, or to be under the control of the holders of the bonds.

There is no declaration of an EXPRESS trust. There are no circumstances to force a constructive trust on the consciences of any of the parties. In the issuance, sale and purchase of the bonds there was no fraud, or misrepresentation, or concealment, no misuse of any influential or confidential relation, from which a CONSTRUCTIVE trust can be raised. No such fact is charged. There are no ACTS of the parties from which a trust in law can RESULT.

The complainants, as we have shown, rest their claim upon matter of contract alone. An IMPLIED trust always springs from matter of contract and presumed intention. The existence of an IMPLIED trust is exclusively a matter of presumed INTENTION. From the whole transaction and the words used it must appear that it was the INTENTION of the parties to create a trust. (1 Perry, 109.) It stands upon the presumed INTENTION of the parties. (2 Story's Eq., 1195.) And taking all the circumstances together, looking to all the language used, it must appear, before a trust can be implied or presumed, as INTENDED by the parties, that that is the fair and resonable interpretation of their acts. (2 Story's Eq., 1195.) And however strong the circumstances may IMPLY an intention, if it positively appears that IN FACT no such intention existed, a trust will not be implied. (1 Perry, 115.)

We have before adverted to these elementary principles, and have done so again because we think they have a controlling application. The question of intention, so far as it appears on the face of the statute, has been discussed. We submit that it is

not only clear that no such intention is to be implied, but further, that the idea that such an intention was, at the time, entertained by either, or any of the parties, is, taking all the circumstances together, and looking to all the language used, absolutely precluded.

The doctrines of implied and resulting trusts have been carried already too far. The courts have been deeply impressed with the danger of them. Kent and other eminent Judges have expressed regret that the doctrine was ever introduced. It is a dangerous thing in the law—it is the existence of a tremendous power—that men may be construed, presumed and implied out of their estates. The complainants' proposition, if sustained, would carry the doctrine further than the boldest flight of presumption has hitherto carried it—it would carry it by the might and main of enforced construction over and beyond the well defined limits of the contract—its plain and obvious meaning, and an intention, the existence of which, as a matter of fact, can not be doubted, and was never before questioned. If this be the law, we will add, and not altogether facetiously, the State of Tennessee may well tremble for the security of her capitol, and school her mind to the surrender of the dust of Jackson, now reposing under her protection beneath the sod of the Hermitage.

But, if the State of Tennessee did constitute herself a trustee by implication; nay, if the statute had in terms vested the lien in her, IN TRUST, for the security of the holders of her bonds, the trust can not, and could not be executed under judicial

coercion. The court can not execute the trust in the absence of the trustee. The trustee is not before the court, and can not be so brought by its process, for she is beyond the reach of its process. The trustee, the party or person in whom the legal title is vested, must be before the court either as complainant or defendant. If a trustee refuse to join, he must be made a defendant. It is in substance admitted in the bill that the State refuses to join in the complaint. Indeed, it is shown in the bill that she has actually discharged the lien. The question we make is not merely the absence of a necessary party; it is more than this: it is the absence of a necessary party that can not possibly be made a party, and, therefore, that the alleged right is one that can not be enforced. We admit the general principle that where there is a right given by law, the law also gives a remedy. But, the sovereign is not subject to the general rules of the law when the incidents of sovereignty are involved. State sovereignty, within the limits of its own and the superior sovereignty of the general government, is a supreme, absolute and uncontrollable power, and as such, has prerogatives, existing in the nature of government, that exempts it from the operation of the ordinary rules of the law. But, it is useless to advert to these principles, for it is a matter of positive law, of positive organic law, that whatever may be the demand against a State, she can not be sued. "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens

or subjects of any foreign State." (XI. Amendment.) As we have before said, at the time of the passage of the act there was no law of the State, nor is there one now, authorizing suits against her in her own courts. If the complainants contracted for a trust, they contracted with reference to the law of the land, and committed the folly of making a contract with a party which they could not sue. They were bound to know the law.

The law is so clearly stated by Perry, in his admirable work on Trusts, secs. 40 and 41, vol. 1, that we shall content ourselves with reading what he says, and referring to the cases which he cites. He says:

"The sovereign may sustain the character of a trustee. He has the legal capacity to take and hold the estate, and to execute the trust, but there is a difficulty in every country in executing the judgments and decrees of a court against the sovereign power of the country. In England it is said that the court of Chancery has no jurisdiction over the King's conscience, for the Lord Chancellor only exercises the equitable authority of the King himself in judging between his subjects. But the greater difficulty is in enforcing the decrees of a court against the sovereign power, for the arms of equity are very short against the perogative. *The subject may have a clear right, but no remedy either at law or equity against the crown;* in such case his only resource is an appeal to the King by a petition of right, and it can not be supposed that he would be refused."

"The United States, and each one of the separate States, may sustain the character of trustee. They have legal capacity to take and execute trusts for every purpose. But a court can not execute its judgments and decrees against a sovereign State with any more effect than the courts in England can enforce their orders against the King. The arms of equity in America are as short against the sovereign power as they are in England against the perogative. Mr. Justice Gray has clearly shown that "a State can not be sued in

law or equity against its consent, or unless there is some general or special statute authorizing the suit" *A subject may have a clear right, but no remedy;* in such case he must petition the legislative power, and there is no reason to suppose that his right (if clear) would be refused. If a State accepts a trust by grant or bequest it must act through its legislative powers in administering the trust, or in creating or appointing agents or officers to perform the duties which it assumes; as the United States acted in relation to the bequest of James Smithson, in trust, for the establishment of the Smithsonian Institution for the increase and diffusion of knowledge among men."

The Internal Improvement law of the State of Tennessee was a contract. It is settled that to enable us to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract to the subject matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. The law does not deny to the reader the same light and information that the writer enjoyed: he may acquaint himself with the persons and circumstances which are the subjects of the allusions and statements in the writing, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described. (1 Addison, 221.) Now, reviewing this contract, and reading it with the lights thus afforded—or reviewing it without any such aid, looking to the words used only, what is it in its substance and effect—to what did the whole transaction amount, and what was the unmistakable intention, understanding, object and purpose

of the Legislature, the corporations, and the purchasers of the bonds of the State? To the apprehension of sound common sense and plain intelligence, earnestly seeking the truth, it was simply this:

The State borrowed money from certain persons, who had it to lend, and who had entire confidence in her honesty and ability to repay the same, for which she executed her bonds; and, then reloaned it to her own railroad corporations, which agreed to pay for her, or furnish her with the means of paying, the interest on said bonds; and, to pay for her the principal when it became due, providing in the meantime a fund, to be deposited in the treasury of the State for that purpose; to secure the performance of which contract, on their part, to the State, the said corporations agreed that a lien in favor of the State, and for her use, should attach to their property, to be enforced in a special manner, as therein provided, or otherwise as might in view of the State, acting through her future Legislatures, seem to be necessary to protect her own interests and to guard against loss on account of her said loan to her said corporations.

Such is the whole substance of the contract, to be thus deduced from its face. Read without any extraneous aid this is the conclusion of such a seeker of intention and meaning; but a re-reading, in the light of all the facts, makes "a confirmation strong as proof of holy writ;" and we with perfect confidence, and with perfect sincerity, yet with perfect deference to the opinion of the Court should they differ with us in opinion, submit that to give the contract the construction and far reaching effect

for which the complainants contend, would be to do violence to its plain terms, to its provisions, and to the real and actual, true intent and meaning of all the parties at the time of the transaction.

STATUTES IN PARI MATERIA.

The Legislature of Tennessee passed many statutes IN PARI MATERIA with the Internal Improvement law. It is well settled that several acts IN PARI MATERIA and relating to the same subject are to be taken together, and compared, in the construction of them, because they are considered as having one object in view, and acting on one system. The object of the rule is to ascertain and carry into effect the intention; and is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. (1 Kent, 464.) "All acts IN PARI MATERIA," said Lord Mansfield, "are to be taken together, as if they were one law;" and on another occasion, "where they are different statues IN PARI MATERIA, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other." (Sedgwick on Stat. and Const. Law, and the cases cited, p. 247.) But the rule is so well settled that no citations to sustain it are necessary.

There are many of these statutes, some of them passed before the passage of the Internal Improvement law, but the larger number since. An examination of them will show, to use the words of

Judge Kent, that they form a code of statutes relating to one subject. They have been recently collected and printed together in one octavo volume of more than five hundred pages. In these statutes, some of which are of date anterior to Feb. 11, 1852, and a very large proportion of which were passed before the present controversy arose, there is not a single section or provision to be found that is not perfectly consistent with and affirmative of the construction of the Internal Improvement law that is adverse to the several positions taken in the bill of the complainants. If there be an exception we have failed to observe it.

We shall neither cite nor state all this legislation, extending over a period of many years, but will refer only to a portion of the more important.

1. We have seen in the examination of the seventh or "Sinking Fund" section of the Internal Improvement law, that provisions are there made, which in their operation are both mandatory and permissive, for the payment and liquidation of the liability of the railroad corporations, on account of the bonds to be issued to them, in ANY of the bonds of the State. On Feb. 21, 1856, about four years afterwards, and long before the LIS MOTA, the Legislature passed another act upon the same subject, and which expressly refers to the original act, p. 143, Laws of Tennessee, 1855-6. By the terms of sections five and six of this act the payment and liquidation of said liability in any of the bonds of the State is expedited twofold, which payment is to be enforced by legal proceedings as provided in section six of the original act, that is, to quote from said section six, "by ordering the

road into the hands of a receiver, ordering the sale of said road, and all the property and assets attached thereto, or belonging to said company, or in such other manner as the court may deem best for the interests of the State." It is made the duty of the railroad companies, at the expiration of five years FROM THE ISSUANCE of the bonds, to annually pay to the TREASURER OF THE STATE TWO PER CENT PER ANNUM upon the bonds, as a Sinking Fund for the ultimate redemption of the bonds, which the Governor, Comptroller and the President of the Bank of Tennessee shall vest in THE BONDS of the State, and reinvest all accruing interest in LIKE securities, and the said officers are constituted a board of commissioners for the management, government and control of said Fund. Comment on these provisions is unnecessary, for it is manifest that under the operation of them the whole liability of the railroad corporations would become extinguished long before the maturity of the specific bonds issued to them, or the whole CORPUS of the property on which the lien was fixed finally sold. A stronger indication of the original understanding and intent could not be conceived or contrived.

On March 20, 1860, another most important and most significant act was passed. This was also before the LIS MOTA, and we will add before the supervention of the disturbing and demoralizing influences of the war, and when the slightest intimation of bad faith on the part of the State would have been repelled with indignation by the humblest of her citizens, and received with contempt and incredulity by the holders of her bonds.

By section first it is enacted that the money or bonds paid to the said sinking fund commissioners, previous to Jan. 1, 1860, together with the accruing interest thereon to that date, shall be passed DIRECTLY TO THE CREDIT of the party paying the same, and be a RELEASE to said party for that amount on THE DEBT DUE BY IT TO THE STATE OF TENNESSEE. The debt from the railroad corporations is thus treated as the property of the State, and as such the State receives absolute part payments of the same, discharges the railroads to the amount of such payments, and this long before the specific bonds which had been issued to the roads had matured, and while they were outstanding in the hands of their holders, who, we will add, complained not.

By sec. 3 of this act the payment and liquidation of the said liability to the State is still further expedited by increasing the sinking fund payments two and a half per cent, AND TO BE PAID SEMI-ANNUALLY. Further, by section five, the payment so required may be made either in cash, or in like character or bonds; and by section six, if paid in money. the commissioners shall invest it immediately in the bonds of the State.

Section seven and nine we beg leave to read in full:

"Section 7. The sinking fund when paid, in all cases shall be passed directly to the credit of said company or corporation, and be a *release* to said company or corporation from that amount due by them to the State. The commissioners shall issue a receipt to each company or corporation for such payment, retaining a duplicate in a well bound book for that purpose."

"Section 9. The Comptroller of the State shall keep a

regular account against each company or corporation, charging them with the amount of bonds originally issued to, or indorsed for, said company or corporation, by the State, and crediting them by the amount of the sinking fund paid, and shall furnish the Treasurer of the State a statement of the amount due by each company or corporation, on the first of June and December of each year, that he may know how much interest each company or corporation has to pay."

This act, (Laws of Tennessee, 1859–60, p. 90,) contains a clear expression that the liability of the corporations was in form and substance a debt due from them to the State; and by its explicit provisions that all sums which had been paid previous to January 1, 1860, should be credited directly as absolute partial payments, that from and after that time payments of two and one-half PER CENTUM PER ANNUM, payable SEMI-ANNUALLY, should be made in money or bonds, and also when paid, in all cases to be passed directly to the credit of the corporations, and operate as a release from the amount due by them to the State; for which a receipt shall be given, of all which a regular account is required to be kept, and which payments are required in terms, (sec. 3.) to be made "as a sinking fund," the practical effect of all which would be to repay to the State the full amount of all the bonds, long before her own liability on them would accrue due, and leaving them outstanding.

There were several other acts in relation to the Sinking Fund, passed by subsequent Legislatures, all in accordance with these, and which were such as were deemed necessary to protect the interests of the State, and to secure her against loss in consequence of the issuance of said bonds, but being of minor importance we will not stop to refer to them.

2. On Feb. 25, 1869, (Public Acts, p. 50,) an act was passed, reciting that the State had loaned her bonds to the corporations, for which she held the security of said lien, and that it is desirable for the general welfare of the State that she be re-imbursed such amounts as have been advanced as fast as may be practicable, which provides, "that the respective railroad companies, or either of them, that have created indebtedness to the State, are hereby authorized to repay any amount of the principle of such indebtedness as they have respectively created, in the bonds of the State, in such amounts, and at such times, as may be practicable." This act, by an act passed Jan. 20, 1870, (Public Acts 1869–70, p. 61,) was amended so as to allow such payment to be made in ANY of the bonds of the State. We will here read the first section only:

"That an Act entitled, "An Act to liquidate the State debt contracted in aid of railroad companies in the State of Tennessee," passed Feb. 25, 1869, be, and the same is hereby amended, so as to allow any railroad company which may be indebted to the State by reason of the bonds of the State loaned to said railroad company, to pay in to the State, in liquidation of the principle of said indebtedness, ANY of the legally issued six *per cent* bonds of the State of Tennessee, outstanding, without regard to series or number; and such payment shall, to the extent made, be a full and perfect discharge of the lien which the State holds upon the property of such railroad company, held by virtue of the bonds of the State issued to such railroad company, whether they be the same bonds, or the same series of bonds issued to said company under the act passed Feb. 11, 1852, and acts amendatory thereof."

These two acts introduce nothing that is substantially new into the Internal Improvement law. Except as to the time of payment, they make no provision as to payment that had not previously

been made. They are in perfect accord with the original sinking fund clause contained in the original act, and with all the subsequent legislation upon that subject. The sinking fund clause in the original act provided that payment might be made in any bonds. The subsequent acts contain the same provision. The only difference between that clause and those acts and these, is this: the former provide for payment in bonds at large by installments; these permit the whole amount of the indebtedness to be paid at once. The principle is the same. The whole of these provisions, from the beginning to the end, are consistent and harmonious; they relate to the same subject; they are governed by one spirit and policy, and turn to the single true intention of the statute and contract with the constancy of the needle to the pole.

These acts are here stated for the purpose of construction only. But they, in connection with the original act, and subsequent acts, lie at the foundation of one of the most vital and important questions in the cause. When we come to consider that question, we will consider them, and the questions that are made in relation to them, more fully.

A number of the railroad corporations discharged their indebtedness to the State by payments in bonds of the State: among these, as just intimated, was the present defendant. But others, as was manifest from the beginning, failed to do so, and run their natural and destined course of failure and insolvency even sooner than had been expected. To meet the exigency of this state of affairs in relation to them, it became necessary for the State

to enforce her lien, and, under and by virtue of her reserved powers, the Legislature passed several acts for that purpose.

3. The Internal Improvement law, as we have seen by sections five and six, provided remedies for both the non-payment of the interest and the principal on and of the bonds, to be used in the name of, and by, the State, with an express reservation, section twelve, of the right to enact by the Legislature thereafter all such laws as might be deemed necessary to protect the interests of the State, and to secure against any loss in consequence of the issuance of the bonds under that act. The powers here reserved, so far as they effect the remedies, would, perhaps, have existed without any reservation; for rights affecting remedies only, as a general rule, are not vested rights. As a general rule every State has complete control over the remedies which it shall afford to parties in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right already in existence; and it may abolish old remedies and substitute new. (Cooley on Const. Lim., and cases cited, 361--'62.) But the question is now one of construction and of intention, and not of powers of enactment. The fact, however, that the Legislature had the power to pass these laws, whether express or inherent, gives additional force to the evidence of intent to be drawn from their provisions.

On December 7, 1867, an act was passed, (Public Acts of 1867--8, p. 14,) by section fifteen of which a power of absolute sale, on failure to pay interest, of the property of the roads was vested in the

Governor and other officers, so absolutely incompatible with the existence of any lien rights in the holders of the bonds as to exclude all idea of such rights.

And on July 1, 1870, another act was passed, (Public Acts of 1870, p. 126,) reciting the said act of December 7, 1867, and "that the time has arrived when it is necessary to protect the interests of the State and to secure the State from the loss in consequence of the issuance of bonds to the several railroad companies of the State, that a sale should be made of the interest of the State, in each and every railroad company in this State, which has heretofore failed to pay the interest that has accrued on the bonds of the State loaned to it, or which may hereafter fail to pay the interest on the bonds of the State loaned to it," and that "it is important to receive the people of the burden now, upon them, and by wise legislation endeavor to restore the public credit, which can be done by a proper enforcement of the legal rights of the State of Tennessee as against said railroad companies so in default;" and, therefore, it was enacted, that the Governor and other named persons, be appointed commissioners to make sales of the roads in default, "for a sum of money equal to the amount of the bonds of the State of Tennessee, with unpaid interests due upon them and which bid may be discharged and satisfied by an equal amount of the bonds of the State of Tennessee, with accrued interest, legally issued by the State of Tennessee, in aid of said railroad company, OR FOR ANY OTHER PURPOSE, and with full power to place the pur-

chaser, or purchasers, in the quiet possession of the railroad so purchased."

And the said commissioner having reported that sales under and according to the terms and provisions of said act could not be made, on Dec. 21, 1870, another act was passed, (Public Acts, 1870–71, p. 25,) providing that judicial proceedings be instituted for the sale of the roads in default. This act will be more fully stated, together with the proceedings which were had under its provisions hereafter. It is sufficient here and for the present purpose, to state that in its whole purview and in its details, in its letter and in its spirit, in proceeds upon the idea, and affirms in the most emphatic and unequivocal manner the said uniform and unbroken interpretation to be deduced from all the previous legislation.

There are various other statutes IN PARI MATERIA with the Internal Improvement law to the same effect. We deem it unnecessary to refer to, or state them. Those which we have cited, and the general tenor and substance of which we have stated, have such a direct application, are so demonstrative, that the accumulation of volumes could add nothing to their forse and effect.

PRACTICAL CONSTRUCTION.

But if, upon the reading of the Internal Improvement law, difficulties should appear as to its proper exposition; if the inclination of the Court should be in favor of the theory of the complainants; there has been a practical construction placed upon the law, long acquiesced in by all parties, under which

communication of that construction to the purchasers of the bonds—that that construction was accepted by the purchasers, from which it follows that the corporation sold and the purchaser bought under the practical construction that no lien was being fixed thereby on the property of the corporation.

Maj. Campbell Wallace, who was the President of the East Tennessee and Georgia Railroad Company, and who sold the bonds that were issued and loaned to that company, after stating the fact that his company had issued bonds of its own, which had been indorsed by the State, proceeds to state the facts in relation to the bonds of the State, which were issued and loaned to his company under the provisions of the Internal Improvement law. These facts, as stated by him, show in a clear and forcible light what was the practical construction of the law, and the general usage under its practical execution. He speaks to the point, and we can not give any summary of his evidence more concise and clear than is contained in his own language.

Among other things, he says, p. 682:

"In our entire dealings with the State bonds issued to our road, we regarded and treated them as the obligations of the State of Tennessee alone, and we treated, construed and regarded our obligations, arising from the loan of said State bonds to us by the State, as a debt due from the railroad company to the State alone, for the amount of the bonds so lent to the company, at their nominal or face value, and they were the equivalent of money, for State of Tennessee six per cent bonds were then worth and selling at par, as the State had never defaulted in the payment of the interest on her bonds at maturity. The $812,000 of State six per cent coupon bonds, payable to bearer, issued to said company during my presidency, were disposed of under my

direction by the Treasurer, R. C. Jackson, and by me. They were sold as required by the law, and their proceeds applied strictly in accordance with its provisions. I sold them principally in Tennessee. I never thought of, or represented, nor directed any one to represent to any buyer, that the payment of the bonds to the holder was secured by any obligation of the company, or by any lien on the property of the company in favor of the bondholders. I did not think so myself, and never heard it suggested or claimed by any one during the period we were receiving and selling them, nor did I ever hear of such a claim by any one, until within the last two years. When we received the several installments of these State bonds from the State as loans, no State officer then, or at any other time, instructed, directed, or requested us to adopt any system or mode of identification, marking or noting the particular bonds issued to us, not even to preserve the numbers, and we did not ourselves adopt any such system or mode; but we simply credited to 'State loan' the amount issued at the time, and on sale of them charged to 'Cash.' In paying our semi-annual interest to the State on the amount of her loan to us we did not attempt to have the payment so made applied to the particular coupons attached to the bonds issued to us, nor did we attempt to hunt up said coupons to pay them ourselves."

"We never entertained the idea that any holder of State bonds was a creditor of the company. On the 15th of December and the 15th of June, of each year, we paid the semi-annual interest due from the company to the State from our company to the Bank of Tennessee, as the general fiscal agent of the State. We paid it indiscriminately in money, *or any six per cent coupons from any State bonds*, whether issued to railroads, or for any purely State purpose. Having paid our interest to the State, and received a receipt for it from the Bank, we felt no further concern whether the State paid her coupons when they matured fifteen days afterwards on the bonds issued to us or not, and we never sought or attempted to get the coupons attached to the bonds issued to our company, nor could we have identified them."

"But as to the bonds of our company endorsed by the State, we did seek, and did pay the coupons on them, as our own liability."

"In keeping the account, and paying the interest due from our company, for the amount of the bonds lent by the State to our company, we regarded it, and treated it, as interest due to the State from our company on the amount of loan, and not as interest due from the company to the holders of the bonds issued to our company."

"We paid our interest promptly and regularly to the State every six months before the war, and to January 1, 1863, but we afterwards fell behind."

"Although the State defaulted in the payment of all her interest coupons on all her bonds during the war, and although the unpaid interest of our company remained unpaid for several years, *yet no holder of the coupons, or of any interest coupons attached to the bonds issued to our company, ever presented such coupons to our company for payment, or ever demanded or claimed payment of the same.*"

R. C. Jackson was an officer of the East Tennessee and Georgia Railroad Company from 1849 to to 1863, and as agent of the company sold many of the bonds which were issued to it. He testifies that when he sold bonds he uniformly represented them as "straight" Tennessee State bonds, resting on the faith and credit of the State alone, and that in no instance did he represent, nor did any purchaser ever claim or intimate that the payment of the bonds was secured by any lien on the property of the company, and, although the witness was connected with and did business for the company so many years, acting as its agent in the sale of the bonds, he never heard that it was pretended that any such lien existed until within the last two or three years. This witness as to the mode of keeping the accounts with the State, as to the facts that the interest was always paid to the State and in coupons of ANY bonds and money indifferently, and in all other particulars, fully corroborates the statements of Maj. Wallace. Mr. Jackson also

makes the same statement of the fact, the most significant fact, that after the State ceased to pay the interest on her bonds no bondholder ever called upon the company for the payment of the same: p. 973.

One of the agents of the State in the sale of these bonds, appointed by Gov. Trousdale, was Dr. J. G. M. Ramsey, a name honorable and honored in "The Annals of Tennessee," states as such agent he sold between three and four hundred one thousand dollar bonds, as "straight" Tennessee State bonds, and obtained a premium on the most of them by representing the facts of the small indebtedness of the State, her great resources and the character of her citizenship, and says that he never mentioned or represented that the bonds were secured by any statutory lien on the property of the road in favor of the bondholder, nor did any broker ever ask him any such question, or make any such claim: p. 965.

We especially request attention to the evidence of Columbus Powell. Mr. Powell was a banker in the city of New York, and as agent for the East Tennessee and Virginia Railroad Company, the company to which the bonds which are the subject of this cause were issued, and other railroads in Tennessee, sold bonds to the amount of at least two millions of dollars. Mr. Powell proves these facts: p. 987.

1. That although the bonds which he sold were bonds which had been issued to said roads under the Internal Improvement law, THE PURCHASERS FROM HIM DID NOT KNOW THAT FACT. The bonds, he proves, were sold simply as bonds of the State of Tennessee. There was no representation, or

suggestion of any lien on the property of the roads, and could have been none, because the purchasers did not know, before the sales were consummated, that the bonds had been issued to railroads at all: and even after the sales were completed, and the bonds delivered, they could only ascertain from their face that they were issued under the law generally, and could not ascertain from their face to what particular company.

2. That in consequence of the frequent interchange of bonds between the several companies, he was himself often ignorant to what company the bonds he sold had been issued.

3. That in the whole course of his business in selling said bonds, perhaps the largest in New York, and in many conversations with bondholders there in relation to the payment of the interest on said bonds, it was never pretended, or suggested, that any lien existed on the property of the railroads to secure the payment of the same; but the point discussed was the sense of the people of the State upon that subject.

4. That there was no difference in the price of Tennessee State bonds as sold on the same day, either for the bonds issued to the East Tennessee and Virginia Railroad, one hundred and thirty miles in length, solvent, completed and with full connections, and for those issued to the Knoxville and Kentucky Railroad, only forty miles long, incomplete, and without connections; or for those issued to the Rogersville and Jefferson Railroad, only sixteen miles long, and incomplete; or for those issued to the Knoxville and Charleston Railroad, only sixteen miles in length, and incomplete;

the last three all being insolvent; or, for those issued to the Mississippi Central Railroad, two hundred and fifty miles long, running across the State of Tennessee, complete and with full connections. After the close of the war, under an act of the Legislature, passed Jan. 18, 1866, (Public Acts, 1865--66, p. 33,) bonds were issued for the purpose of repairing various roads, on the same terms and conditions prescribed in the Internal Improvement law, to which the latter act was amendatory, and it is to these bonds that Mr. Powell refers when he speaks of bonds issued to roads completed. In this connection Mr. Powell adds: "It was a well known fact that these short insolvent railroads received twice as many bonds from the State per mile as the solvent roads, and yet the bonds on the market sold at the SAME price, as my books will show, and I give the following illustration from my books: We sold through our broker in the Board of Brokers, in New York, on Sept. 20, 1866, $80,000 of Tennessee bonds, at 71¾, 72¾ and 73, and we delivered in consummation of these sales bonds indiscriminately from the following roads: 'The East Tennessee and Virginia,' 'The Knoxville and Kentucky,' and 'The Rogersville and Jefferson.' This is only an illustration of what frequently occurred. In one instance we sold in the same manner $100,000, in which the bonds of the Mississippi Central Railroad were delivered in common with the bonds above mentioned and at the same price."

5. And Mr. Powell also proves the same fact proved by Col. Tate, that the bonds of the State always commanded a higher price than the bonds of the roads endorsed by the State.

John J. Craig also did business in New York as a banker, and as such sold many of said bonds. He says: "They were coupon bonds of the State, payable to bearer. I sold them as straight Tennessee State bonds, and did not represent them as having any lien on any railroad in favor of the bondholders. THE QUESTION WAS NEVER MOOTED AS TO THEIR BEING ISSUED TO ANY RAILROAD AT ALL." "If," he adds, "it had been believed, or represented, that there was additional security of any kind, it would have increased the value of the bonds; but they were sold wholly as State bonds, and their value rested upon the faith of the State in paying them."

This witness also proves that for many years previous to the war he did business in Knoxville, Tennessee, as a banker, and dealt in these bonds, and proves that in practical businsss they were always considered and treated as the exclusive obligations of the State, and that no such idea as a lien in favor of the holders of them was ever entertained or suggested.

The legislative branch of the State government has, as we have shown in stating a number of acts IN PARI MATERIA uniformly placed the same practical construction upon the Internal Improvement law. Such an exposition alone is entitled to to much weight; (Sedgwick, p. 252;) but when it has been acted upon, acquiesced in, and ratified by all parties in interest, as well as by strangers, it becomes of controlling authority. Under the acts of Feb. 25, 1869, and Jan. 20, 1870, a number of the roads that had received aid under the general Internal Improvement law fully paid and discharg-

ed the liability that had accrued, and the lien that had been created, under and by vitue of the same.

Section third of the act of Feb. 25, 1869, in order to facilitate the several railroad companies in repaying their indebtedness due to the State, authorized a consolidation of roads, and under this authority the East Tennessee and Virginia and the East Tennessee and Georgia, were consolidated under the corporate name of the East Tennessee, Virginia and Georgia Railroad Company, by which corporate name this suit is brought on account of the bonds issued to the former company as before stated. Among the roads which discharged their said liability and the said lien, under the said acts were these two consolidated roads. And after doing so, they made and negotiated, under their said consolidation, their own bonds to the amount of three millions and five hundred thousand dollars, secured by mortgage on their said property, which bonds were purchased and paid for by BONA FIDE purchasers, believing that the lien under the Internal Improvement law had been discharged by the said payment under the said acts, and that their own was a first mortgage.

Under the several statutes, before noticed, directing judicial proceedings to be instituted for the sale of the non-paying and insolvent roads, a bill was filed in the Chancery Court at Nashville, under the style of the State of Tennessee vs. the Edgefield and Kentucky Railroad Company and others, which was so prosecuted that decrees for the sale of said roads were obtained and pronounced, and under which sales were actually made. In this cause it was, among other things, expressly adjudicated "that

the statutory lien, or mortgage, secured by the said Internal Improvement laws, under which State bonds were issued to the said several companies, was intended and does inure only to the benefit of the State, and that the holders of said bonds have no right now, and will have none at the maturity of said bonds, by way of subrogation, or otherwise, under and by virtue of the said several acts and the lien or mortgage reserved and secured by them, to go upon the said several companies or their roads or property for the payment of either the principal or interest of the said several State bonds, but must look exclusively to the State for payment."

Under the sales thus made under this judicial construction of the law, the present defendant purchased several entire roads, in good faith, believing it was acquiring a good and valid title. One of these roads it yet owns, the Cincinnati, Cumberland Gap and Charleston Railroad, and one of them, the Rogersville and Jefferson, it has since sold. The said sale was made before notice of the claim of the complainants, and, at a time, the defendant believed that it had a good title, a valid right to sell and convey, and the purchaser bought and paid for the same in full faith and confidence that he was acquiring a valid and unencumbered title.

Of these practical expositions of the law by the Legislature, the judiciary and the roads and persons dealing in and with their property the complainants, and the holders of the bonds of the State at large, must have had notice, and they made no opposition thereto, nor gave any notice on their

part of any claim adverse to, or in conflict with the rights thus being asserted and acquired.

The holders of the bonds were bound to take notice of these statutes. Independent of the fact that they were public statutes, they had notice of the most conclusive character, and of a nature, which, under well established principles, admits of no explanation.

The rights of the State, of the corporations, and of the holders of the bonds all flow from one common source; they all arise out of the provisions and stipulations of the Internal Improvement law, the law and the contract under which they all claim and by which they are all bound. The State and the corporations were the original parties, and the holders of the bonds made themselves parties by purchasing under its provisions. That they hold directly under the provisions of the statute, according to the right which they assert, and are seeking to enforce, is a self-evident proposition.

They claim under the statute, and this being so, they are bound to notice every provision which it contains. They say they purchased under this contract, and there is no principle of law better established than that a purchaser will have constructive notice of every thing which appears in any part of the deeds or instruments which constitute the title purchased. The right of a purchaser can not go beyond his own title, and whatever appears on the face of the title papers forms an integral part of the title itself. Such notice, as we have said, is of the most conclusive character, and is insusceptible of being explained away or rebutted. The rule is the same whether with regard to

the necessity of the case, and has long been recognized and acted upon.

But, an amended and supplemental bill was filed making various holders of the bonds of the State parties defendant, with an averment that the parties of the class of which they belonged were numerous and unknown, having a common and identical interest, and with a prayer that those so brought before the court be held to represent the whole, which was ordered, and no defense being made by any of them judgments PRO CONFESSO were regularly taken and entered against them.

A very large proportion of the stock now owned in the East Tennessee, Virginia and Georgia Railroad Company was purchased and acquired under this construction and understanding of the law.

It was purchased in good faith under and with the belief that the said lien was vested exclusively in the State, absolutely, for her own sole use and benefit, and that the same was under her absolute control and dominion. As we have before stated the general course of dealing with the roads has been under and governed by this exposition of the law, and we here call attention to these particular transactions for the purpose of illustrating the magnitute of the transactions, and to show the extent of the interests that have thus become involved.

From what has been said it is manifest that this is the construction that has been practically acted upon by the State government, as well as by individuals. It is the construction placed upon the law by the persons, officers and agents, both of the State and of the corporations, whose special duty it

was made to sell the bonds, and to otherwise execute the provisions of the law and carry it into practical effect.

The State, the holders of the bonds of the State, the railroads, and all other persons, for a period of nearly twenty years, concurred in this construction. No suggestion that the law was susceptible of any other construction was ever made until about the year 1870, and when made it received no serious attention, and the idea was treated as absurdly untenable. Not a bondholder asserted any such a claim until the commencement of this litigation. The bondholders held over-due unpaid coupons—if they had claimed an interest in the lien a cause of action had accrued—accrued as far back as 1862, or 1863, yet no action was instituted. Not even a demand of payment from the roads was made. They were brought before the Chancery Court at Nashville, and called upon to assert their demands, if any they had. They still remained inactive and silent, and allowed judgment PRO CONFESSO to be taken and entered against them.

These transactions were of the most public and notorious character possible. The State government was a party. The proceedings were legislative and judicial, and published officially, and discussed in the public prints. The holders of the bonds of the State had a direct interest in informing themselves of all matters in relation to the steps being taken by their debtor in relation to this property, upon which she had fixed a lien to aid her in the payment of her bonds. It is impossible to read this record without coming to the

conclusion that the holders of the bonds had full actual notice of all the facts and circumstances which are in evidence.

Maj. R. T. Wilson is the President of the defendant, and also of another and one of the most important of the Tennessee railroad corporations. He resides in New York, and has for many years been engaged there in the business of banking. The complainants, as is to be inferred, having entire confidence in his integrity and intelligence, have made him their own witness, and have taken and filed his deposition in evidence. His testimony throws much light on the questions of practical construction and of estoppel, and of knowledge and acquiescence on the part of the complainants; as well as upon others. We do not propose to state here his testimony at large, but crave leave to read from it a few brief passages.

He is asked what sources or means of information did the holders of State bonds residing in Tennessee and New York have of the settlement of the railroads with the State while they were going on, and he answers as follows:

"The matter was a subject of public discussion in the papers of Tennessee, and the large purchases of Tennessee bonds attracted public notice more or less through the financial columns of the papers of New York, which attributed the large transactions in them to purchases made for railroad account, with which to retire their indebtedness to the State, and in addition to this the substitution bonds issued in lieu of the Tennessee State bonds were advertised in New York, for sale, as is shown by the following copies of advertisements, from which it will be seen that each advertisement gave notice that the substitution bonds had been issued in lieu of the debt to the State of Tennessee, and carrying its lien by assignment from the State. I present

and file herewith copies of these advertisements and names of the papers in which they were published as Exhibits to my deposition." P. 517.

An examination of the exhibits will show that they were published in the leading papers in New York, and that they gave full notice that bonds of the East Tennessee, Virginia and Georgia Railroad were offered for sale, secured by a mortgage on the property, created for the sole purpose of paying off its debt due to the State of Tennessee.

Again he says:

"I never refused or kept back from them (the Tennessee bondholders) any information upon this subject, but on the contrary I told one and all, when asked (and I was asked by a great many of them respecting the probable value of these bonds) what was being done, in a general way, by the roads in retiring their debts to the State, and frequently alluded to the laws under which these settlements were being made, and, so far as I now recollect, the bondholders, without a single exception, approved of the roads paying their debts to the State, and joined with me in the opinion that this was the best and surest way of restoring the credit of the State. Besides this the purchases of bonds by the roads and the payment of their indebtedness to the State and the sale of the new railroad substitution bonds were matters of public notoriety both in New York and in Tennessee." P. 524.

And again he says:

"It had been practically considered for twenty-five years or thereabouts that the State was the entire and absolute owner of the lien, and held it without any kind of interest on behalf of the bondholders. I think the idea of its having been a lien on behalf of the holders of State bonds would have been ridiculed in any part of Tennessee. The practical construction given to it from its very first inception up to the time this suit was commenced never hinted that the lien belonged to anybody else but the State. The State had thus practically construed the law during all this time, and I so

read the law, and the bondholders up to the commencement of this suit had acquiesced in this construction:" P. 508.

But, the letters made exhibits to the deposition of Peter Geddes seem to be conclusive of the questions.

One of these letters, dated Feb. 15, 1877, and signed and approved by the complainants, and other large bondholders, addressed to Jas. D. Porter, then Governor of the State admitting a previous communication to the same effect in the year 1876, in relation to these bonds, treats them in all respects as the primary debt of the State of Tennessee. The writers go so far as to submit a plan for the adjustment and payment of the debt by the State. They propose that the revenue laws of the State should be amended; that reforms as to public expenditures should be adopted; that taxation be maintained and collection of the same enforced; that the expense of the State Government be deduced; THAT THE LEGISLATURE PASS A LAW AUTHORIZING THE FUNDING OF ALL OUTSTANDING BONDS OF THE STATE, OF ALL PAST DUE COUPONS THEREON, INTO NEW BONDS OF THE STATE HAVING FIFTY YEARS TO RUN, BEARING SPECIFIED RATES OF INTEREST, AND THAT, A SPECIAL TAX BE LEVIED TO RAISE A FUND FOR THE PURCHASE, CANCELLATION AND DESTRUCTION OF THE NEW BONDS: p. 433.

From this it is manifest that no idea of asserting any such demand as is now brought forward was, or had been entertained. A reading of the document at large will show that it was to the State, and to her alone, that they looked for payment.

This letter was written long after the State had discharged and enforced the liens, as were the

others which we shall briefly notice. Before the lien was enforced and discharged the debt of the State amounted to over forty millions of dollars; by those transactions it was reduced to something over twenty millions, and this fact is directly recognized in this letter. They say by their plan of adjustment they "will voluntarily relinquish about seven millions of their claims AGAINST TENNESSEE, an amount equal TO ABOUT ONE THIRD OF THE AMOUNT OF THE PUBLIC DEBT"—a direct admission that the public debt had been reduced by means of the payments made by the defendant and other roads, and the sales of roads, and an acquiescence in the same to all intents and purposes. This is the only allusion to the lien contained in the document, a solemn instrument, deliberately prepared, addressed to the executive of the State, in relation to the rights of the parties as holders of these bonds, and this allusion treats it as having been lawfully discharged and exhausted.

On Aug. 1, 1877, Peter Geddes, one of the complainants, wrote to James L. Gaines, State Comptroller, among other things in relation to the bonds of the State as follows:

"The debts of the railroads to the State may now be regarded as practically settled. What remains is simply a question between debtor and creditor.

Freed from the complication which grew out of these railroad debts the discussion of the debt question will be very clear and simple henceforward.

If a few of you men of influence and character would unite in an effort to bring about a compromise on the basis of 75 per cent. I think it could be effected satisfactorily to all, while it is very doubtful if an acquiesced in settlement at a lower figure would ever be regarded as other than a forced one by the public and the bondholders:" P. 442.

On August 23, 1877, he again wrote to the same, among other things as follows:

"I duly received your esteemed favor of the 8th current. Since then I learn that the Mississippi and Tennessee Railroad Company have voted to pay off their debt to Tennessee. This practically settles up all advances made by the State to railroad companies and reduces the whole State debt questions to one between the people of Tennessee and the investors in their public debt. What the latter will agree to do I cannot say. They may or may not not adhere to their proposition of last February:" P. 444.

The proposition of February here referred to is the one contained in the letter addressed to Gov. Porter.

Again on August 27, he wrote to the same:

"I have just had an interview with Mr. Osborne, who reports that in thirty days the parties in whose interest the Mississippi Central was bought in the other day will receive a confirmation of their purchase. It is quite well understood here that so soon as they can do so with safety, they will pay off the lien of Tennessee on the Mississippi Central, and that they now think they can safely pay it off sixty days hence.

There is thus little doubt that the last of Tennessee's advances to the railroads within her borders will be paid off early in the fall, thus freeing her and her creditors too, for that matter, from a very troublesome disorder:" P. 445.

These letters, and others from which we have not quoted, contain much more matter to the same effect, all establishing the propositions of fact which we have stated.

Then, if such has been the long, unbroken, practical construction of the Internal Improvement law of the State of Tennessee, with the acquiescence, results and consequences which we have stated, will that construction be now disturbed?

Will the holders of the bonds of the State of Tennessee, which were sold under that construction, which have been held under that construction for more than twenty years, after an acquiescence during the whole of that period, and silently standing by and seeing all the vast and varied transactions shown in the proof, be now permitted to establish and enforce a lien in their favor, the direct and inevitable result and consequence of which will be to destroy millions of property, the acquisition of which they have directly encouraged?

We respectfully submit that upon principles of law, well established, founded in the depths of reason and commended by the purest morality and justice, the Court will answer these questions in the negative.

Commencing at the beginning we quote from Lord Coke:

"Great regard ought in construing a statute to be paid to the construction which the sages of the law who lived about the time, or soon after it was made, put upon it, because they were best able to judge *of the intention of the makers at the time the law was passed.*"

And here is the reason why all contemporaneous construction is reliable, when it has been practiced upon—the means of judging of the intention of the makers of the law at the time it was passed.

In the case of Rogers vs. Goodwin, 2 Mass., 477, 478, it was held that a practical construction early and generally obtaining must prevail. The Court said in relation to the matter before it: "We can not shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law."

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The same Court in Packard vs. Richardson, 17 Mass., 121, 143, in regard to a construction of the statute of frauds, said: "A contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms made use of by the Legislature. If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the Legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction, under such circumstances, becomes established law."

This case is exactly in point, the facts being not only within the principle but within the letter of the opinion.

In the case of Nelson vs. Allen and Harris, 1 Yerg., 376-7, the Supreme Court of Tennessee said: "Much respect has always been paid to the contemporaneous construction of statutes, and a forbidding caution hath always accompanied any approach towards unsettling it, dictated no doubt by easily forseen consequences attending the sudden change of a rule of property, necessarily introductory, at the least, of confusion, increased litigation, and the disturbance of the peace of society. The most able judges, and the greatest names on the bench, have held this view of the subject, and occasionally expressed themselves to this effect, either tacitly or openly intimating that if they had held a part in the first construction, they would have been of a different opinion, but the construction having been made they gave their consent thereto."

Chancellor Walworth, in the case of the Bank of

Utica vs. ————————, 3 Barbour, 577, quoting from Lord Coke that the common opinion is good authority in the law, says, where it is not a mere speculative opinion in the community as to what the law upon a particular subject is, and when such opinion has been frequently acted upon, and for a great length of time, BY THOSE WHOSE DUTY IT IS TO ADMINISTER THE LAW, and important individual rights have been acquired, or are dependent on such practical construction of the law, this expression of the learned commentator on Lyttleton is entitled to great weight.

So in Chesnut vs. Shane, 16 Ohio, 599, it was held that in construing ancient statutes contemporaneous construction as evidenced by usage will not be departed from without most cogent reasons, and if the construction is doubtful usage will control.

In the case of the Attorney General vs. the Bank of Cape Fear, 5 Irdell's Eq., 71, the question was this—the charter of the defendant provided that a tax of twenty-five cents on each share of stock owned by individuals in the bank should be annually paid into the treasury of the State, and it was contended that the words of the act had no application to the State, which was a share holder but a usage to the contrary had prevailed. The Court said: "From the wording of the acts it might well be doubted what was the expectation of the Legislature, as to the fund out of which the tax was to be paid"—"where by the penning of a statute its meaning is rendered doubtful, long usuage is a just medium by which to expound it" —"this rule governs in the construction of the fundamental law of the land, the constitution of the

United States"—"a contemporaneous exposition, practiced upon and acquiesced in for a period of years, fixes the construction."

The same doctrine has been frequently held and applied by the Supreme Court of the United States. Among others is the case of Edward's Lessee vs. Darby, 12 Wheaton, 206, in which the Court said: "In the construction of a doubtful and ambiguous law, the contemporary construction of THOSE WHO WERE CALLED UPON TO ACT UNDER THE LAW, AND WERE APPOINTED TO CARRY ITS PROVISIONS INTO EFFECT, is entitled to very great respect."

Again in the case of the United States vs. the State Bank of North Carolina, 6 Peters, 12, Judge Story, who delivered the opinion of the Court, construing an act of Congress, said: "It is not unimportant to state that the construction which we have given to the terms of the act is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. A practice so long, and so general, would of itself furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischief. We think the practice was founded in the true exposition of the terms and intent of the act, but if it was susceptible of some doubt so long an acquiescence in it would justify us in yielding to it as a safe and reasonable construction."

We also cite, as fully sustaining our position, and as being in perfect accord with the cases already cited, McKeer vs. Delancy, 5 Cranch, 22, and Union Insurance Co., v. Hoze, 21 Howard, in the first of which it was held that uninterrupted prac-

tice under a staute was good evidence of construction, and in the latter that the practical construction given to a State statute BY THE PUBLIC OFFICERS OF a STATE, should, perhaps, be regarded as decisive in a case of doubt, or where the error is not plain,

In the case of Stuart vs. Laird, 1 Cranch, 299 the doctrine was applied to the construction of the Constitution of the United States. The case was decided in the 1803, and the question made was that the Judges of the Supreme Court had no right to set as Circuit Judges, not being appointed as such; in other words, that they ought to have distinct commissions for that purpose. The Court said: "To this objection, which is of recent date, it is sufficient to observe that practice and acquiscence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and indeed fixes the construction. It is a contemporary interpretations of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest, and ought not now to be disturbed."

It would seem that no further authority to establish our point is necessary. The application of these doctrines of practical construction, and of the controlling force of usage and acquiescence, drawn and deduced from the solemn determination of not only Courts entitled to the highest respect, but from the adjudications of the Court of last resort in Tennessee, an act of the Legislature of which is under consideration, and of the Court of last resort of the United States, in a Court of which the cause

is pending, is so plain, so obvious and so directly called for, as we see the matter, that we deem further comment upon them unnecessary.

A greater evil can scarcely be imagined than uncertainty, change and fluctuation in questions affecting rights, and regulating the conduct, course of business, titles and the general interests of a whole community. When a rule of property has been established and acted upon, and acquiesced in, whether by the construction of a statute, or by judicial opinion, or by common consent and practice, it has been and is adhered to with uniformity, unless some great fundamental principle is violated. If the rule is the result of a construction of a statute, it matters not by what means or process the construction has obtained, whether by judicial determination, by legislative interpretation, by a practical contemporaneous construction of the persons whose duty it was to execute the provisions of the law, or long practice, usage and acquiescence, if not in contravention of some matter of controlling and forbiding public policy, or of the organic law, and it has become a rule of property, and rights have generally been acquired under the construction; and if the conduct and course of business of a whole community in relation to great public interests have been shaped and regulated thereby, and with reference thereto, and there has been long acquiescence, it will not be disturbed although its original correctness may be doubted, fluctuation being deemed an evil of such great magnitude, and fruitful source of so much injustice and social disturbance as not to find its equivalent of good in any fancied or real approximation to

greater correctness. It may be Sir William Jones in his Essay on Bailments, carries the analogous doctrine of STARE DECISIS somewhat too far, when he says "no man who is not a lawyer would ever know how to act, and no man who is a lawyer, would, in many instances, know what to advise, unless courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate;" for it is one of the merits of our common law that it silently changes with the changes in the habits and affairs of men; but the principles which we have stated, and to the full extent stated, seem to be firmly established in our law.

We concede that when a construction, or rule is new and is of recent origin, has not been generally acted upon, when it has not met the approbation of either the legal profession, or the public at large; or when it is clearly contrary to public policy or the organic law, that it is not to be upheld; but, on the other hand, where there are no such considerations, under the conditions which we have stated, the principle will be supported and upheld and the ancient landmarks not departed from. In the cases of Wolfe vs. Lowry, 10 Louisiana Annual, 272, and in Day vs. Munson, 14 Ohio State, 48, the rule is concisely and correctly stated: If no fundamental principles are violated, a construction given to a statute, having become a rule of property, should be adhered to so long as the statute remains unchanged.

ESTOPPEL.

We not only insist that the construction of the Internal Improvement law has been thus practically conclusively fixed, but that the holders of the bonds of the State are under an equitable estoppel, growing out of the same facts, to insist to the contrary.

We do not propose to go into a re-statement of the evidence. It has in substance been stated correctly, and from it it is to be indubitably educed that if the bondholders had, under the law, an interest in the lien, they, by their conduct, both active and passive, made the impression on the minds of the owners of the property, and of all persons who have dealt in and with it, that such a right would not be asserted or enforced, and knowing that such an impression had been made, and that it was in good faith being acted upon, in entire ignorance of any intent to the contrary, stood silently by, and did not speak out.

If such a lien existed, it was matter of pure contract, resting upon legal intention, the lawful interpretation of the words used; and the holders of the bonds were bound to know their rights. In fact, the bill is framed on the theory that they did know their rights, and there is no averment or pretense to the contrary.

Grant that the owners of the property were also bound to know the said supposed legal interpretation of the statute, of which, however, the evidence demonstrates they never dreamed or had any idea, or suspicion.

Grant this, yet the fact remains, beyond any room for question or controversy, that the conduct and acts of the complainants, and of those with whom they are in privity, were such as we have stated with the effects and consequences which we have stated; and now the question is, can the complainants after thus leading the defendants into this line of action, allowing them to slumber in fancied security for twenty years, be permitted to come forward and revive their ancient, stale and long abandoned right?

The law applicable to these facts has been thus well expressed:

"It is a universal law that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, can not question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

"If a party has an interest to prevent an act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had had it been done by his previous license:" 2 Story's Eq., 1546, Red. ed.

Again, if a lien existed, it is clear from the evidence, that it was not regarded for many years—indeed not until about the time of the institution of this suit—as of any moment by the holders of the bonds; that if they had two debtors, the State and the corporations, they by their acts and conduct elected to look to the former alone, and aban-

doned all the claim against the latter, never making any assertion of, or demand upon, the same. The position they now seek to occupy is totally inconsistent with that, and to the prejudice of those who acted upon their said election.

A party cannot occupy inconsistent positions; and when one has an election between several inconsistent courses of action, he will be confined to that which he first adopts. Any decisive act of the party, done with knowlege of his rights, and of the facts, determines his election, and works an estoppel. Biglow, 578, and cases cited.

We make these special points of estoppel, but, we insist that the general principles of estoppel have more or less application. It is a familiar principle that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent; the principle of an estoppel IN PAIS being that he who holds his peace when he ought to have spoken, shall not be heard at a time when he ought to be silent. For, if a man having title to an estate which is offered for sale, and knowing his title stands by and encourages the sale, or stands by and does not speak out, he will be bound, and can not question the validity of the title thus acquired; and, so if a party having title to an estate, stand by, and allow an innocent purchaser to expend money on the estate, without giving him notice, he will be held as estopped from asserting his title. 2 Story's Eq., 384, et seq.; 1 Swan, 439.

In the recent case of Gregg v. Von Phul, 1 Wallace, 281, it was said: "The doctrine of estop-

pels IN PAIS, or by the act of the party, is founded in natural justice, and is a principle of good morals as well as of the law. The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. No one should be permitted to keep silent, when he should speak, and thereby mislead another to his injury. If one has a claim against an estate and does not disclose it, but stands by, and suffers the estate sold and improved, WITH KNOWLEDGE THAT THE TITLE HAS BEEN MISTAKEN, he will not afterwards be allowed to assert his claim. And justly so, because his silence has actually worked harm to the purchaser."

This is a recent statement of the law by the Supreme Court of the United States, and is directly applicable to the facts of this case. If such a lien existed, it is clear that the defendant was mistaken as to the same—and the conduct of the defendant, and those dealing in its stock and in its property, investing large amounts of money, and otherwise dealing in the property, was ample evidence and proof to the holders of the bonds that there was a total mistake as to the existence of the lien. It is no answer to this to say that it was a mistake of law, which the owners of the road were bound to know, for the principle has no application to THEM. The lien, if it existed, was not expressly declared in favor of the bondholders, and is the result of construction—the trust if it existed was not an express, but an implied trust only. The law was by no means clear. If it existed, it was only constructively certain, not plain to peruse

generally; and we understand the law to be non settled that in such a case the principle that forbids a plea of ignorance of law is to be relaxed, especially where the other party has been in default. To enforce the doctrine in such a case would be at variance with the long established doctrines of courts of equity, and a reproach to the law itself. (1 Story's Eq., 126, 138.) If the owners of the property were under a mistake as to their title, the complainants knew the fact, and did not disabuse their minds, but allowed them to proceed to their prejudice. But no such exception can be made in favor of the complainants, for, under the theory of their case, they were under no misapprehension as to their rights, stood upon them, now stand upon them, and assert that they were and are plain and undeniable.

And having this knowledge the complainants stood by and did not assert their claim—stood silently by, and saw the owners of the property, laboring under this misapprehension, dealing with it, acting upon the faith of a universally received understanding that, saving the rights of the State, it was not encumbered. They are now, if they ever had any lien, estopped from asserting it; and this, in the language of the Court, upon "a principle of good morals as well as of law," because the effect of their silence has actually worked harm to, and misled all parties who have been concerned with, and now hold the posession of the property in controversy.

PAYMENT.

On August 11, 1870, the whole amount due from the defendant on account of bonds issued under the Internal Improvement law to the East Tennessee and Virginia Railroad Company was paid, and a receipt for the same executed and delivered by the Comptroller. This payment was made to the State in her own bonds and past due coupons. The amount so paid was $2,363,870.70. The fact is both pleaded and proved.

If the lien created by the terms of the Internal Improvement law, under a proper construction thereof, was intended in the beginning to inure to the benefit of the purchasers of the bonds, the law also contained, as we have seen, not an implied, but an express provision that that lien might be discharged and extinguished by payment to the State. We refer to section seven, called the Sinking Fund clause. We have already, under another head, stated the substance and the practical effect and operation of this section. It was an express provision and stipulation contained in the contract under which complainants claim the ownership of said lien, and they are, therefore, bound by it to all intents and purposes. This section not only permits payment in any bonds of the State, but REQUIRES such payment to be made, in amounts and at times, which, as we have shown, would about extinguish the debt, and, as a consequence discharge the said lien, about the time of the maturity of the bonds.

The acts of Feb. 25, 1869, and of Jan. 20, 1870, therefore introduce no new principle into the In-

ternal Improvement law. The right to pay in any of the bonds of the State was as fully secured in the original act, as it was in these subsequent acts. If the operation of these acts was to defeat a lien vested in the complainants by the original act, the obligation of the contract was not thereby impaired, because the contract itself, which was the law of the case, provided that the lien might be so defeated. If it can be held in the face of said section seven that it was intended that an interest in the lien should vest in the purchasers of the bonds, the conclusion that they took it under an express agreement that it might be, before the maturity of their own bonds, or by that time, discharged by a payment to the State in any others of her bonds is irresistible, and can not be avoided.

It is true that the acts of 1869 and of 1870 accelerated the time of payment, and permitted the whole indebtedness to be paid at one time; but this does not in the slightest degree affect the principle, nor does it affect the lien, substantially, otherwise than a faithful execution of the original law would have affected it.

The payment which is pleaded and proved was in form made under the provisions of these acts of 1869 and 1870, but the validity of it, however it may affect any supposed lien in the complainants is fully sustained by the express provisions of the original law.

The fact that the defendant made said payment is not controverted, but it is insisted that the said two acts are void because they come within the prohibition of the national constitution against

legislation impairing the obligation of contracts, and, therefore, that the payment is unavailing as against the complainants. This is an assumption that is without foundation, because, as we have shown, these acts do not alter the principle of the contract under which they claim, do not affect any right in respect to the lien that was not in like manner affected before, and can not be said to impair any obligation of the contract within the meaning of the constitutional restraint upon State legislation.

But the legislation of 1869 and 1870, amendatory on its face of the original law, and in terms expressly referring thereto, is to be regarded and construed as a part of the latter, and as incorporated with it, the whole constituting but one statute.

Section seven provides for and requires payment in any bonds, as we have just seen; but it was not intended that no further or future provision should be made, and it was, therefore, further provided in a subsequent section, section twelve, several times before stated, as follows:

"That the State of Tennessee expressly reserves the right to enact by the legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interests of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of this act."

It does seem to us that the meaning of these plain direct words is so obvious and clear that no room for construction is left.

By section fifth provision had been made to secure the payment of the interest on the bonds "issued on the provisions of this act."

By section seven provision had been made, through the means of a sinking fund, to pay the principal, or nearly all of the principal, of the bonds "issued under the provisions of this act," and this in bonds other than those "issued under the provisions of this act," at the election of the roads.

The State of Tennessee was solvent, amply and fully able, and willing, and in good faith contemplated the payment of every dollar of her public debt. This was assumed on all sides, and conceded by all persons. Besides, it is not to be, and cannot be presumed that she contemplated her own insolvency, or the repudiation of her obligations at any time, or under any circumstances.

And by section six an ample provision had been made to secure the payment of whatever of the principal of the bonds might possibly remain unpaid at their maturity after the scheme in section seven provided had been fully worked out.

The whole transaction was in substance but a loan by the State to the roads of money in the form of the negotiable bonds of the State.

Now, it is manifest, that there was but one possible way in which the State could sustain loss "in consequence of the issuance of bonds under the provisions of this act," and that one way was by the roads failing to pay the interest on them as provided in section five, and by failing to comply with the provisions of section seven, and failing to pay such balance of the principal as might remain unpaid after a proper and faithful execution of the provisions of section seven.

The only possible source of loss to the State was a failure of the roads to repay the said loan, principal and interest. The only possible interest to be protected was the interest of the State to have the said loan re-paid.

The State contemplated the payment of her bonds. She knew no difference between them. As far as she was concerned one set of bonds was of as high and binding obligation as any other. The delivery to her of any one of her one thousand dollar bonds was equivalent to the payment of that much money. And when one of these roads delivered to her one of these bonds in re-payment, to all intents and puposes it operated to secure her only interest in the matter, and to secure her against loss, to the extent of the amount of the bond.

The said section can possibly be construed to mean nothing more than the reservation of the power to secure a re-payment to the State of the said loan by still further devices and means than those already provided should they in their practical operation fail to secure the consummation of that purpose. The reservation of the power for this purpose was unlimited. It embraced all such laws as might be deemed necessary to protect the interests of the State, and to secure her against any loss in consequence of the issuance of the bonds, and, as she could not possibly sustain any loss otherwise than by a failure of the roads to repay the loan, the power embraced any law to secure such re-payment—most certainly such a repayment, that is, any bonds of the State, as had in

the previous section been expressly required and provided for.

The meaning and intention of this section, if not clear on the face of the act, would be made so by reading it in connection with, and in the light of a similar section in another act, passed by the same Legisature only a few days before the passage of this act.

This act was passed on Feb. 11, 1852. On Jan. 15, 1852, the same Legislature passed an act authorizing the Governor to issue the East Tennessee and Virginia Railroad Company the coupon bonds of the State to an amount not exceeding three hundred thousand dollars, to be appropriated to the building of bridges, to secure the re-payment of which a lien was created on the property of the company. The act contains the same provisions for the enforcement of the lien should the company fail to pay the interest on the bonds or refuse to pay any of said bonds when they fall due, and for a sinking fund and re-payment in any bonds of the State, as are contained in the internal improvement law, passed a few days afterwards. These are to be found in sections six, seven and eight.

By section first the bonds were made payable in not less than thirty, nor more than forty years; by section six the semi-annual interest is required to be paid to the Bank of Tennessee; by section eight the Sinking Fund is provided for, payable in the bonds of the State at large, under the operation of which the debt of the company to the State would have been nearly, if not quite extinguished before the maturity of the bonds issued to the company,

and by section seven an enforcement of the lien is provided for to secure the payment of any of the bonds—that is, necessarily, of any amount of said bonds still remaining unpaid.

Section four, from which section twelve of the Internal Improvement law was clearly taken, the two sections being clearly intended to be in substance the same, is in these words:

"That the legislature of this State shall have power to enact any law or laws that may hereafter be deemed necessary to protect the interest *or credit* of the State, against any loss, *or damage on account* of the issuance of said bonds, *and to provide for the more speedy and certain payment by the company of said bonds and interest*, not impairing the vested rights of stockholders, *and for that purpose*, and for the purposes of notice of the existence of this act, the same is hereby declared to be a public law."

That the two sections not only may, but should, be construed in connection with each other can not be denied. They have the same general subject matter; both were intended to secure the State on account of a loan of its bonds to the same identical person; they are in regard to remedial provisions precisely the same, and were passed near the same time, by the same Legislature. They belong to the same code of statutes, relating to one subject, were governed by the same spirit and policy, and were intended to be consistent and harmonious in their provisions.

The difference between the two sections is this—the first in express terms declares how the State may be secured against loss on account of the issuance of the bonds, that is, by future legislation providing "FOR THE MORE SPEEDY AND CERTAIN PAY-

MENT BY THE COMPANY OF SAID BONDS AND INTEREST."

This can not be interpreted to mean the payment of the specific bonds issued to the company, for they had not less than thirty years to run, and were purchased under the express contract on their face that they should so run before maturity. It refers to the payment of the interest, and especially to the payment to the State under the sinking fund clause.

The former section also provides in express terms for the protection not only of the interests, but of the CREDIT of the State, thereby meaning the reduction of the debt of the State by procuring and enforcing the re-payment of the loan by the means of the sinking fund therein provided, or otherwise enabling the State to meet her bonds.

This section is still more explicit in one other particular. The power reserved is not only to protect the State against loss, but against DAMAGE on account of the issuance of the bonds. How could the State be DAMAGED on account of the issuance of the bonds? In but one way, to-wit, by the failure of the company in re-payment, and, therefore, the power was intended to embrace all such means as might be deemed necessary to guard against such a contingency by requiring a more speedy and certain payment TO THE STATE than those already provided for, or to be provided for, in the act.

It would seem that the twelfth section on its face, giving the language its plain meaning, according to the fixed acceptation of the signification of the words employed, contains full and ample reservation of power lawful and constitutional to enact the acts of

1869 and 1870; but that when read in connection with the other sections of the same act, and in the light of section four of the previous act, that the intention is so clear and unmistakable that there is nothing for the Court to say or do but to declare, ITA LEX SCRIPTA EST; "it is the office of the Court to administer the law as the Legislature has declared it; the language of the statute is plain and unambiguous, and when such is the case the will of the Legislature must be obeyed."

The position taken that these acts are void and inoperative because they impair the obligation of the contract is untenable. This, of course, is an assumption that under the Internal Improvement law the holders of the bonds acquired a vested interest in the liens therein created. Grant this for the time, and yet the position is untenable. If the effect of the law was to vest the lien in them, it also expressly provided for its subsequent extinguishment and discharge by payment to the State, whether for its own use, or for the use of the bondholders, it is not necessary here to consider. The contract, as we have shown, contained such a provision.

But, further, the law on its face, of which all persons taking or holding under it had and have notice of the most conclusive character, expressly reserved the power to pass these acts. When such a power is reserved it is deemed a part of the contract, and withdraws the contract from the protection of the Federal constitution. (1 Kent, 419; 2 Parsons on Con., 514; Cooley's Const. Lim., 279; 21 N. Y., 9; 22 N. Y., 9.) This is not sustained by direct authority only, but is in accordance with reason.

Where a power to modify, change or alter a contract, or statute, is expressly reserved on the face of it, and is thus made one of its component parts, it can not be said that a subsequent exercise of the power is, in any legal sense, an impairing of the obligation of the contract. The purchasers of the bonds were bound to know the terms upon which, and the provisions of the law under which the bonds were issued. The bonds on their face disclosed the act of the Legislature under which they were issued. They purchased subject to this reserved right of the State, and the actual exercise of the power reserved did them no legal injury. They are without ground for complaint in law or morals.

It is insisted that the acts of 1869 and 1870 are not in their terms applicable to the road of the defendant. It is true this road is not designated by name, nor is any other; but it comes clearly within the general description—any railroad company which may be indebted to the State by reason of the bonds of the State loaned to said railroad company, which bonds are described as the bonds issued to said company under the act of Feb. 11, 1852.

It is said that the State is only secondarily liable on tbese bonds, and that, therefore, they come within a PROVISO to the act which excludes from its operation bonds on which the State was only secondarily liable. We have already, we think, shown that the liability of the State on these bonds was primary, and not secondary. But there were in existence bonds which had been made and issued by the roads, indorsed by the State, upon which the liability of

the State was only secondary. Such were the bonds issued under an act passed Feb. 8, 1854. But the construction thus contended for is repelled by the declared purpose of the acts that the bonds issued by the State under the act of Feb. 11, 1852, might be thus paid.

But the motive of this legislation of 1869–70 is impugned, and is charged to have been the result of an improper and fraudulent scheme. How fraud can be predicated of these acts it is difficult to see. They give no right that was not in substance secured by the original law, and were within the letter and spirit of the power of future legislation expressly reserved.

But, if it were competent to go behind acts of the legislative branch of the government, which, however, we maintain the judicial branch of the government has no power or jurisdiction to do, these charges are not sustained by evidence. On the contrary, the charges are disproved, and this, we will add, in part, by the evidence of the complainants.

Maj. Wilson proves "that no man, in or out of the State, up to the time of the passage of the acts of 1869 and 1870, so far as he ever heard of, for one moment supposed that it was necessary to enact further legislation in order to get the privilege of paying the debts of the roads in ANY bonds of the State—that is, no railroad man ever supposed such a thing necessary. They had too many urgent demands made upon them for payment to the Sinking Fund, to admit of their believing that it was necessary to procure the legislation in order to get the privilege of paying their debts in the identical thing

in which the State was constantly pressing them to pay without such legislation. The sole and whole object of the legislation was to enable the roads to substitute their own bonds so as to carry with them the lien of the State, to raise money with which to buy Tennessee bonds to pay their debts to the State, and thus meet the pressing demands of the State which were shortly to be made on the roads for their dues to the Sinking Fund, which payments were to be resumed in 1870." P. 521.

Again he says: "At that time (the date of the passage of these acts,) there was hardly a railroad company in the State that could raise money on its own bonds. This act came to their relief in regard to the sinking fund payments, and gave them the means or facilities with which to raise money to meet their engagements. A further inducement was to get the companies out of the hands of the State and to separate the railroad system of Tennessee entirely from the State: first, because I believed the roads would be worth more if freed from interference of the State officers and directors: and secondly, thereby the State debt would be so reduced that it would enable the State to resume the payment of interest, and take her place as one of the great States of the American Union, which I thought would enhance the value of my property in the State fifty per cent., and I still think so, that was the moving cause in this operation. It has been worth millions of dollars to the State of Tennessee and her bondholders by reducing the obligations of the State in a greater degree than could have been done otherwise. P. 498.

"Furthermore, I may be permitted to say that

this legislation was in entire harmony with the wish of every debt paying man at the time, or nearly so. I never saw but one man who was honestly in favor of paying the debt of the State that opposed it, and that was Hon. Henry Cooper, and he afterwards expressed himself delighted with the result that had been accomplished in the reduction of the State debt, and gave as his reason for then opposing it that he was afraid the railroads would not retire their debts under it, but would use it for speculating in State bonds." P. 499.

The evidence of Col. John M. Fleming is so pertinent, and contains so concise and lucid a statement of the whole matter, that we beg permission, as it is not long, to here read it. He says, p. 1000:

"Since attaining my majority my occupation has been that of an editor and lawyer; have been twice a member of the State Legislature, and for two years was State Superintendent of Public Instruction. For about twelve years, closing December, 1878, I was editor of a daily political paper in Knoxville.

"I was a member of the General Assembly of the State of Tennessee for 1869–70 and a portion of 1871 and held the official position of Chairman of the House Committee on Judiciary. I can state in general terms and somewhat in detail 'the facts and reasons' that influenced my own action as a member of the General Assembly, and, as I believe, the action of those other members constituting a majority of the body with whom I cooperated in effecting the legislation referred to.

"The General Assembly of 1869–70, when it met in October, 1869, found the State of Tennessee in a

deplorable financial condition. The political and social condition of the State from the close of the war up to that time may be described as having been one of disorder. The people were much and widely divided in sentiment, and the majority, for political reasons, had been deprived of the right of suffrage by State Legislature enactments. Pending this state of affairs the Legislature had made very liberal appropriations to works of internal improvements (at the instance, it is proper to say, in many cases of the disfranchised element,) so that on the first Monday in October, 1869, when the General Assembly met, it was found that our State debt, actual and contingent, had swollen to the appalling volume of about $40,000,000 to $42,000,000. The State treasury was empty, the resources of the State for purposes of revenue were very much reduced, in consequence of the demoralization of our labor system and other causes, and the people were neither in a condition nor humor to submit to a heavy rate of taxation.

"The State had made default in the payment of the interest the previous July, and its bonds in consequence were were much depreciated in the financial markets. The General Assembly found itself confronted with the alternative of providing for the payment of the interest on the debt, or of repudiating or indefinitely postponing it in whole or in part. The idea of repudiation was not seriously entertained by the majority of the body, and yet it seemed utterly impracticable to provide for the interest upon the face of the debt as it then stood. To reduce the debt, therefore, to a manageable condition became a study. Upon investigation

only about $120,000 of bonds were ascertained to have been illegally and fraudulently issued, and the payment of those was interdicted.

"The validity of the remainder of the debt was practically recognized, and the Legislature went to work to so take care of the debt as to preserve the honor of the State. An examination of the general situation disclosed the fact that a number of the railroad companies to which liberal loans of bonds had been made had become hopelessly insolvent. They had ceased to pay interest on the loans, their roads were unfinished and in the hands of Receivers appointed by the Governor, under the terms of the general Internal Improvement acts. These roads, instead of paying expenses, were a burden upon the State treasury. The rolling stock was wearing out without hope of replenishment, and the roads themselves rapidly going to decay. I had, myself, for several months before my election advocated through my newspaper the sale of all the defaulting roads as a measure of good State economy, and I was the author of the original bill providing for their sale.

"My recollection is that the original bill, which was by no means perfect, but only designed as the basis upon which to elaborate a more perfect bill, was drafted by me in my own room, and offered in the House without consultation with any one. The original bill was referred to the Judiciary Committee, to which committee I presented a more elaborate bill as a substitute for the original, and my recollection is that the latter bill was reported by the committee in lieu of the original, and with some amendments finally became a law.

The Commissioners appointed by the act, having selected their attorneys, undertook to proceed with their duties, but discovered, as they reported, that the law was insufficient, inasmuch as proper authority for proceeding in chancery for foreclosure had not been conferred by the act. Thereupon a new bill, prepared I believe by the Commissioners and their attorneys, was presented and enacted, and under THAT law the defaulting roads were sold. The purpose of their sale, as before intimated, was to save as much as possible of the State's failing securities and utilize them in the reduction of the bonded debt. Subsequently to the introduction of the bill above described, and before its passage, the bill was introduced, which became a law on the 20th January, 1870, enabling the debtor railroads to retire their indebtedness by discharging it with bonds of a series. This act was designed to remove and did remove the restriction that had been placed upon the railroad companies by the proviso to the act of 10th March, 1869, which restriction limited the payment by railroad companies that had issued second mortgage bonds, to the same series of bonds to which the bonds belonged that had been issued to them. It was not considered that the bill (the act of July 20, 1870,) conferred any NEW rights or privileges upon the companies, but that it simply restored the privilege enjoyed under the sinking fund clause of the Internal Improvement act of 1852, under which it was understood the railroad companies had discharged their amount of indebtedness for years in bonds of the State without regard to series.

"This principle had been recognized from the establishment of our Internal Improvement system,

by both the Executive and Legislative departments of State, and the General Assembly of 1869–70, in passing the act of January 2d, 1870, did not regard it as any innovation upon the long settled policy of the commonwealth in regard to such settlements. But a few years before, the State, with the concurrence of all departments of the government (the Attorney General having sanctioned the proceeding), had settled with the Louisville and Nashville Railroad Company, receiving bonds in payment without regard to series. And this settlement was made by virtue of the provisions of the act of 1852 and amendments thereto, above referred to. This act of Jan. 20th, was believed to be inherently just, but there was another consideration moving the Legislature to its enactment. The called solvent roads that were expected to avail themselves of its provisions were in an embarrassed condition. They had but recently been restored from military possession to the possession of the companies. They were struggling for rehabilitation under very discouraging circumstances. There was a general desire for their resuscitation and re-establishment as permanent thoroughfares for our commerce, but it was apprehended that under the pressure of accumulated debt and impaired credit they would soon be compelled to suspend their payments to the State, be classified as defaulting roads, and pass into the hands of receivers, and ultimately be sacrificed at immense loss both to the State and the companies, and in their view of the case it was regarded as a measure of sound and healthful policy for all the interests involved to accept from the so-called sol-

vent companies in discharge of their debts the bonds of the State, of any series, and to permit them to issue PRO TANTO their own first mortgage bonds, the two-fold object being the reduction of the debt of our State and the rehabilitation of our railroad system. These two measures, the bill to sell the defaulting railroads, and the bill to enable railroad companies to retire their debts, were regarded as kindred measures, and progressed almost PARI PASSU, though differing considerably in the date of final passage. The friends of one measure were generally the friends of the other, the purpose in the minds of the majority being to reduce the volume of the public debt to manageable proportions, and to marshal all available assets of the State for that purpose. As a result of the operation of the two measures the volume of the debt was reduced to about $20,000,000, a sum which, with judicious management, I think might have been carried by the State with comparative ease. Such are the principal facts and reasons that influenced my own action, and, as I believe, controlled the action of the majority of the members of the General Assembly of 1869-70. In regard to the legislation referred to in the interrogatory as to the 'public sentiments of the State' in reference to the two measures, I can only say that while they were pending they seemed to command almost universal approval. Their passage was centainly generally acquiesced in. It was not until after the refunding of the State debt in 1873, when there arose a somewhat clamorous outcry against the validity of portions of the public debt, that there was manifested any serious popular dissatis-

faction with either of the measures referred to. Notwithstanding the investigation of a joint select committee, of which I was a member, had shown that in some cases there had been irregularities in the procurement of bonds from the State, the legality of their issuance and the validity of the debt had not been seriously disputed until 1873, as before stated, nor had the propriety and wisdom of the legislation referred to until then become a subject of grave popular complaint. Such is my recollection."

"The commissioners appointed by the Legislature to sell the defaulting railroads were Hon. R. J. McKinney, Hon. Archibald Wright and Hon. Francis B. Fogg. The first two named had been Judges of our Supreme Court of Tennessee, and the last named was a lawyer of advanced age and marked eminence. All three were conspicuous personages in the Commonwealth, in whose integrity the whole population had confidence. It was because of their ability and universally recognized incorruptibility that they were selected as commissioners by the General Assembly."

And he further states that within his knowledge no corrupt influences were used by the railroad companies, or their officials, or any of their agents to induce this legislation.

But, if an act of the Legislature be constitutional, the judiciary has no power to question its validity. It has been urged at the bar, in some cases, that the courts ought to inquire into the motives of the Legislature where fraud and corruption are alleged, and annul its action if the allegation be established, but the argument has in no

case been acceded to by the judiciary, and it has never allowed the inquiry to be made. (Cooley's Const. Lim., 186–187.) "The courts can not impute to the Legislature any other but public motives for their acts." People vs. Draper, 15 N. Y., 545. "We are not made judges of the motives of the Legislature, and the court," says Shankland, Judge, in the same case, "will not usurp the inquisitorial office of inquiry into the BONA FIDES of that body in discharging its duties." And, said Gookins, Judge, in Wright vs. Defrees, 8 Ind., 302: "The powers of the three departments are not merely equal; they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. It is now proposed that one of the three powers shall institute an inquiry into the conduct of another department, and form an issue to try by what motives the Legislature were governed in the enactment of a law. If this may be done, we may also inquire by what motives the executive is induced to approve a bill, or withhold his approval, and in case of withholding it corruptly, by our mandate compel its approval. To institute the proposed inquiry would be a direct attack upon the independence of the Legislature, and a usurpation of power subversive of the constitution."

THE FUNDING ACT OF 1873.

The General Assembly of the State of Tennessee, on March 17, 1873, passed an act, entitled, "An Act to fund the past due bonds and coupons of the State, and to sustain the credit thereof." Acts of 1873, p. 34.

An examination of the depositions of the complainants, and especially of the bonds filed by them, will show that they accepted the provisions of this act, in whole or in part, and such also was the case with the bondholders at large.

The title of the act shows that its object, purpose and intent was TO FUND the bonds and coupons of THE STATE that was past due, and to sustain the credit thereof.

TO FUND a public debt, as we understand it, is to pledge the public funds and revenues for the payment of the public securities. The funding system, originated by William of Orange, at the time of the English Revolution, is a name given to a plan which provides that on the creation of a public loan, funds shall immediately be formed, and secured by law, for the payment of the interest, until the State shall redeem the whole, and also for the gradual redemption of the capital itself. This gradual redemption of the capital is called the sinking of the debt, and the fund appropriated is called the sinking fund. In its original it was a provision for the raising of money for public purposes, but now, and especially in the United States, it is used as a means of adjusting a pre-existing public debt, and for providing and appropriating a specific fund, or permanent public revenue for that purpose. The process and operation of the scheme is to substitute a new for an anterior obligation, by a kind of novation, whereby the old debt is merged and extinguished, and the holder looks alone to the substituted bond as evidence of his right, and relies upon the pledge of the fund provided for payment.

But, further, an examination of the statute under consideration, with the acts of the parties under its provisions, will show that by an EXPRESS CONTRACT the holders of the bonds of the State of Tennessee and of unpaid coupons, abandoned whatever securities, liens or mortgages they may have had for the payment of the same, and accepted in lieu thereof a new security, and to a partial extent new and substituted evidences of the debts due to them, which acts and transactions are followed by certain inevitable and irresistible legal consequences which so fix and determine the rights and equities of all parties as now to conclude them from asserting any previously existing rights, equities, or remedies

Now, remembering, and constantly bearing in mind, that previous to the passage of this act of March 17, 1873, the State had by acts of the most direct, positive and unequivocal character—by discharging and exhausting the lien declared in the act of 1852—asserted her own exclusive property in, and absolute dominion over, the said lien, let us examine the said act of March 17, 1873, and see what were its provisions.

In substance it was a proposition, made under the state of facts to which we have referred, to the holders of the bonds of the State, and of the unpaid coupons of the bonds of the State, THEN outstanding, due, or to become due Jan. 1, 1874, that they might fund the same, that is, renew the same, in six per cent coupon bonds of the State of Tennessee, to be styled "The New Series of Funding Bonds," redeemable at the option of the State after July 1, 1884, and due and payable on July 1, 1919,

and bearing six per cent interest evidenced by coupons attached, payable semi-annually, on the 1st days of January and July in each and every year from and including the 1st day of July, 1874, to the maturity of the bonds, which proposition was, if accepted, to be accepted with these provisions:

1. That no coupons of BONDS then due should BE PAID other than those falling due on and after the 1st day of July, 1874, and only such coupons of said bonds maturing after that time as shall be presented to the Comptroller, and registered, after being examined and found to have been issued according to law, and the registration properly indicated therein by him and the Secretary of State. Sec. 9.

2. That bonds falling due between the 1st day of July, 1874, and the 1st day of July, 1884, should be fundable at the option of the State in like bonds of "the new series of funding bonds" as above described. Sec. 11.

It was further provided that if said proposition should be accepted the contract should be executed and carried into effect in the following manner:

1. That the said past due bonds and coupons should be presented to the Comptroller of the Treasury and audited and the genuineness of the same determined by him and the Governor.

2. That if found genuine, a proper bond of "the new series of funding bonds" should be prepared, and registered, together with the old bonds or coupons, as the case might be, and the new bond issued to the party demanding the same, the issuance of the same being first marked on its face over the signature of the officer.

3. But before receiving the new bond the party demanding the same was required to sign a full memorandum of both the bonds and coupons so funded, which demands so funded were required to be immediately registered in a cancelling book, and then canceled.

In making this proposition the State did not recognize the existence at any time of the lien in question. Indeed she could not have done so, for the previous acts and conduct were utterly inconsistent with any supposition of the existence of such right in the holders of her bonds. The proposition itself was in its effect an absolute denial of the existence of any such right. Nor was any security for the payment of the principal and interest of the proposed new bonds, in the form of a lien on property, offered or tendered.

Provisions for payment, however, were made, and express provisions being made any idea of others is excluded. These are contained in section 3, which reads as follows:

"That the faith, honor and credit of the State of Tennessee is hereby pledged for the payment of said bonds at maturity; and for providing a sinking fund for that purpose, and for the prompt payment of interest on said bonds, *as well as the interest on the registered bonds hereinafter provided for*, commencing with the interest to fall due the 1st day of July, 1874. And it is hereby made the duty of the Treasurer of the State to set apart for that exclusive purpose so much of the revenues as may be necessary to pay the interest on said bonds commencing with the interest that falls due on the 1st day of July, 1874."

The proposition contained and involved in the provisions of this act was accepted by the complainants and the other holders of the then outstanding bonds of the State.

They came in and surrendered for cancellation bonds which were due before Jan. 1, 1874, and received new bonds in their stead.

They came forward with unpaid coupons to the same time, and received said new bonds for the same.

They registered under the provisions for registration contained in section nine.

They bound themselves to fund under the act, at the option of the State, all other bonds to fall due before July 1, 1884.

And they in doing these things, whatever may have been their previous rights, conclusively bound themselves to look to the State for payment not only of the new bonds so issued, but of all the registered bonds under section nine, and, for still stronger reasons, the bonds designated in section eleven.

Upon this statute, and the acceptance of its provisions, we make these points and maintain these propositions:

I.

The statute and the acceptance of its provisions was a practical construction of the act of 1852, made by the State and the holders of the bonds, of the most direct and express character.

As a matter of fact it thus appears what the parties in fact considered their respective rights were.

It was a most unequivocal admission by the bondholders that they had no vested lien rights, and abundantly shows that in fact they then did not consider or pretend at that time that they had any such rights. It was an admission so direct and so solemn in its character, and which has been followed by such momentous consequences, that they will not now be permitted to assert to the con-

trary. It was a practical construction of the act of 1852 of the most notorious character, made in the most binding manner. It was expressed on the face of the old bonds by the cancellation of them. It was expressed on the public records of the State. The fact of the construction was made apparent on the face of the new bonds themselves, by the indorsement of their issuance, giving notice to all men into whose hands they have, or may come. And it was a construction that stood unquestioned and unchallenged for years, during the lapse of which the public at large, and especially the present owners of the roads, confiding in the same, and acting under the same, have acquired interests of great magnitude, which would be entirely ruined were the complainants now permitted to assert to the contrary.

This statute, and these acts of the parties, should have been adverted to for this purpose when we were considering the question of the practical construction of the act of 1852 more at large. But we have chosen to discuss the questions thus arising all together; for, if we are not most egregiously mistaken, the act of March 17, 1873, and the acceptance of its provisions, were, to all intents and purposes, a final and conclusive settlement of all the questions now sought to be controverted.

II.

But let us now concede to the complainants that under a proper construction of the Internal Improvement law, on its face, and in connection with all other statutes on the same subject, they had a clear vested right to the lien therein declared,

which on March 17, 1873, continued in full force and effect, in legal contemplation, unaffected and unimpaired by any matter of practical construction, conduct or estoppel. Let us further concede that the complai ants were then existing upon and asserting the right to said lien thus conceded to have been vested in them.

What was the position of the State, and of those holding and claiming under her, at the same time? The fact is clear, and cannot be questioned, that it was absolutely and diametrically antagonistic to any such lien rights in the bondholders. The State in the assertion of her own absolute and exclusive property in said lien, for a full consideration, had discharged it from the property of this defendant, and from the property of many other roads. In other cases she had in the assertion of the same right instituted legal proceedings, and enforced the lien by a sale of the property on which it had been fixed. If she had thus proceeded wrongfully—if she had received satisfaction and enforced the lien when in law she had no right to do so, when the lien was in fact and in law the property of others, that right and property was unaffected thereby. The owners of the lien still had the right to have it enforced for their own use and benefit, and if enforced, the State would most certainly have been under obligations, moral at least, to refund the money which she had received.

This is the theory of the case made by the complainants in their bill. They insist that they have such lien rights, and of course that they had them on March 17, 1873, and that the previous acts and doings of the State in relation to the lien, were as

to them, all absolutely null and void, and that the lien was still in full force and effect to secure the payment of the bonds which they held.

At this juncture the State came forward and made the propositions contained in the act of March 17, 1873.

The proposition was simply this:

ABANDON YOUR CLAIM TO THE LIEN, and I will renew the bonds that are due, and that will mature on or before Jan. 1, 1874; further, I will execute you bonds for all unpaid interest to that time; but if you accept, I reserve the option to renew in like manner all other bonds that may mature between July 1, 1874, and July 1, 1884; and, further, you must register all your bonds, under this proposition, with a view, and for the purpose of receiving the interest thereon; and, if you will so abandon your said claim, then, in lieu of the lien which you claim, I will pledge you my faith, honor and credit, for the payment of said bonds at maturity, and for providing a sinking fund for that purpose, and for the prompt payment of interest on said bonds, as well as the interest on said registered bonds; and I will make it the the duty of my treasurer to set apart for that exclusive purpose so much of my revenues as may be necessary to pay the interest on said bonds, commencing with the interest that will fall due on the 1st day of July, 1874.

That the act of March 17, 1873, in its provisions, was utterly inconsistent with the continued existence of a lien vested in the bondholders is certainly a self-evident proposition.

It was in fact equivalent to a denial that any such lien ever had been vested in them; but, as we have done for the purpose of placing the case of the complainants on the strongest possible ground, concede that in law the lien had been so vested, it could not continue after an acceptance of the provisions of the act, for they were incapable of a co-existence, and the acceptance of one involved irresistibly an abandonment of the other.

If the original bonds had been the primary liabilities of the roads, the State now proposed to take them up, cancel them, and issue others in their stead, positively pledging her own faith, honor, credit and revenues for their payment, and nothing more. No collateral security of any kind, no lien or mortgage was tendered, or offered.

It cannot be intended—it cannot for an instant be intended—that the State, when she made this proposition, contemplated that the liens which she had discharged, enforced and exhausted, should continue, if it were accepted; and it would be as glaringly absurd to contend that the bondholders when they accepted the proposition so understood or intended.

The complainants were not bound to accept the proposition. If they had had said lien rights, they could have stood upon them, and declined to accept. On the supposition and concession that such rights were vested in them, an election was tendered to them, and they made an election, and agreed to come in, and to take and hold under the statute.

The doctrine of election is familiar. The party who is to take, has a choice, but he can not enjoy

the benefits of two inconsistent claims. As we have before shown, a party can not occupy inconsistent positions; and where he has an election between several inconsistent causes of action, he will be confined to that which he first adopts. Any decisive act of the party, done with knowledge of his rights, and of the facts, determines his election and works an estoppel. (Bigelow on Estoppel, p. 578; Gregg vs. Von Phul, 1 Wallace, 281.) The doctrine has been frequently applied to acts and conduct under statutory enactments. In the case of Ferguson vs. Landrum, 5 Bush, 230, it was carried so far as to hold a party estopped from questioning an act of the Legislature clearly unconstitutional the passage of which he had procured and under which he had acted.

It is true that all the bonds outstanding were not actually funded under the act, for it embraced only the bonds and unpaid coupons matured and maturing to January 1, 1874, yet by funding these the holders committed themselves to the principle and theory of the statute. They can not take under it in part, and hold against it in part. The statute contained a principle, it asserted an interpretation of the original contract under which all the bonds had been issued, and when the holders accepted that interpretation in part, they conclusively estopped themselves from questioning its correctness as to the remainder.

Further, they funded, and accepted the offered security so far as their demands had matured with the express condition that all other bonds to mature down to July 1, 1884, should be likewise funded at the option of the State.

And further still, they so funded under the general registration provisions of the act, which applied to all bonds, and afterwards actually registered under the same, to entitle themselves to receive the interest on their bonds as provided in section third of the act, thereby committing themselves to hold all their bonds under all the provisions in the act contained, whether actually funded under it or not. They can not be allowed to accept in part, and reject in part. If they availed themselves of one provision, they must be held as having assented and agreed to all the others.

III.

We will consider the provisions of this statute, and the acceptance of them, in still another light and view—AS A CONTRACT, without any reference to the questions of construction or estoppel.

First. Again grant that the original bonds were the primary liabilities of the roads, and that they CONSTITUTED a lien on the property of the roads, all as is now claimed by the complainants.

It is a familiar principle that where a bond, or other debt, is secured by a lien or mortgage that the bond or debt is the principal thing, and the mortgage or lien only an incident, so that a discharge of the debt, if done before foreclosure extinguishes, the mortgage. (4 Kent, 193.) If, said the Supreme Court of New York, in Jackson vs. Stackhouse, 1 Cown, 126, the debt due on the bond was in judgment of law released, the mortgage would be discharged also. An assignment of the debt secured by a mortgage, carries with it the mortgage as an

incident. (18 Wallace, 151.) Even a mere parole assignment will draw the land after it as a consequence and as being appurtenant to the debt; (4 Kent, 194;) and for a stronger reason the extinguishment of the debt extinguishes the mortgage, for the existence of the latter depends upon the former.

Now, that the original bonds, which constituted the lien, or mortgage, according to the theory of the complainants, were extinguished, and that the coupons outstanding were extinguished, when they were surrendered, canceled, registered as canceled, and other bonds issued in their stead, cannot be controverted. This is certainly true as to bonds and coupons matured on Jan. 1, 1874. If the original bonds were the primary liability of the roads, these new bonds were certainly not so. In form, in terms, in the provisions for their payment, they were made and accepted as the sole obligations of the State. The roads were not even parties to the transaction, and of course to no extent became bound by the new bonds, which as to time of payment, and in other particulars, were entirely different contracts from that contained in the original bonds.

The transaction was in no sense and to no extent a renewal by the roads. They, as we have said, were strangers to the transaction, and took no part in it. In fact, they denied that they were liable on the old bonds, and, as a consequence any and all idea of any renewal on their part is excluded.

And all the other outstanding bonds which will mature by the 1st day of July, 1884, are liable o

be extinguished, at the option of the State, in the same manner.

Second. The direct effect of the contract was, in consideration of the new bonds and the new pledges and provisions for the payment of the interest on ALL bonds, a release of all pre-existing collateral liens and securities, and especially of the said supposed lien under the act of 1852.

The funding provisions are absolutely antagonistic to, and inconsistent with the existence of any such lien, and having been accepted by the complainants it must be held that they thereby expressly released and abandoned the lien, for they can not be permitted to hold under the statute, and accept its provisions so far as they are in their favor, and then reject all the others. The provisions which they accepted were made with the understanding that no such lien existed or would be set up. This can not be controverted. The position of the State was one of perfect antagonism to the existence of such a lien, made known to all the world by her previous dealings with the same. These provisions were made and proposed with the intention of maintaining that position, and when they were accepted by the holders of the bonds the lien was yielded. They must be conclusively held to have accepted the proposition, as a matter of contract, according to the understanding and intent with which THEY KNEW the same was made on the part of the statute. There can be no escape from this consequence.

And right in this sequence, and to make the contract full and complete, follows the provision for the payment of the interest on the bonds which were

not funded. This provision results from the joint operation of sections three and nine, and is not only in some particulars entirely new, but is so express as to how, under what conditions, the interest shall be paid, and from what source the money shall be drawn, that it of itself excludes all idea of any resort to such a lien for the purpose, and the holders of the bonds having accepted it, the waiver of the lien, if any had existed, was complete.

This provision was in substance this: All such bonds were required to be presented to the Comptroller, and after the legality of their issuance being established, registered, and the registration properly indicated THEREON by him and the Secretary of State, which being done the faith, honor and credit of the State of Tennessee became pledged for the prompt payment of the interest on said bonds, it being made the duty of the Treasurer of the State to set apart for that exclusive purpose in part so much of the revenues as might be necessary for the payment of the same.

And, then, as a final token that all further claim to any such lien was abandoned, and that the question should from thence forward be at rest, they agreed that all bonds, not then funded, might on the call of the State, down to July 1, 1884, be delivered for cancellation, and new bonds issued in their stead.

Such was the contract, and we maintain that, whatever rights they may have previously had, the holders of the bonds of the State thereby irrevocably bound themselves to look to her, and to her alone, for the payment of the same.

THE QUESTIONS ADJUDGED.

But as we understand the facts and the holdings of this Court in the case of Chamberlain vs. St. Paul and Sioux City Railroad Company and others, 2 Otto, 299, the main controlling questions which we have endeavored to discuss on general rules and principles, have been authoritatively adjudicated and settled. The case to which we refer seems to be so directly in point as a precedent that we deem it admissible to comment upon it somewhat more fully than is usual in the citation of an authority, though not at any great length.

This case it has been said decides that "where land is conveyed to the State by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds which can be enforced against the State, and her grantees take the property discharged of any claim of the bondholders;" but it decides much more than this.

It decides that where a State loans her bonds to a railroad corporation, and the corporation binds itself to pay the same, principal and interest, for the State, and to secure the performance of the agreement yields to the State a mortgage, or lien, on its property, the holders of the bonds have no interest in the lien or mortgage, because the State is the party primarily liable to the holders of her bonds, and it is only as between her and the corporation that the relation of principal and surety exists; and in such case it is not INTENDED that the deed or mortgage to the State should be a trust in favor of the holders of her own bonds.

It further decides, in substance, that if a State should so constitute herself a trustee, it would be a trust that could not be executed, because the State could not be sued.

It decides further, in substance, that if it were so that the bondholders held an interest in the mortgage, or lien, that they might be estopped from asserting it by such acts and laches as appear in this record.

And it is to be educed from the case that the exercise of powers reserved to future legislatures over the lien is not an impairing of the obligation of the contract.

The bonds in relation to which these decisions were made were issued by the State of Minnesota. The original constitution of that State provided that the credit of the State should never be given or loaned in aid of any individual association or corporation; but this was amended on April 15, 1858, so as to make an exception in favor of certain railroads in aid of which the United States had granted lands to the previous territory of Minnesota, and this amendment provided for and regulated the issuance of said bonds. These provisions we will briefly notice, showing that there is a substantial parallel between them and the Internal Improvement law of Tennessee.

It was provided that the SPECIAL bonds of the State as a loan of public credit, should be issued to said roads for the purpose of expediting the construction of the same, to be signed by the Governor, registered, denominated "Minnesota State railroad bonds," made payable to the order of the company

to which issued, and transferable by the endorsement of the President thereof.

In some of these provisions a stronger case is to be found to support the theory of the complainants than is to be found in the Tennessee law; for the bonds are to be denominated railroad bonds; they are required to show on their face to what company issued, for they are to be made payable to its order, and are to be transferable by the indorsement of the President; whereas in the Tennessee law no such provisions were contained; the bonds were issued as State bonds pure and simple, with nothing on their face to indicate to what company issued, and transferable by delivery; and the purchasers of them, in many cases, neither knew nor cared to know, to what particular company they had been issued.

The amendment to the constitution of Minnesota further provided that "each company should make provisions for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company, and for the punctual payment of the interest which shall accrue thereon, in such manner as TO EXONERATE THE TREASURY OF THE STATE FROM ANY ADVANCES OF MONEY FOR THAT PURPOSE. This language, as indicative of an INTENTION that the bonds should be and constitute a liability of the corporations is almost in its literal sense direct, and is infinitely more expressive of such an intent than any to be found in the Tennessee law. The Tennessee law provides (sec. 3) that the State shall be invested with the lien "for the payment by said company of said bonds;" that, (sec. 5) "it shall be the duty of said company to

deposit in the Bank of Tennessee an amount sufficient to pay the interest," or, "satisfactory evidence that said interest has been paid or provided for," but if default be made, and the remedy provided for the State in that event prove unavailing, then, and in that event, the interest shall be paid out of the general treasury of the State; but the Minnesota law provided that the treasury of the State should be exonorated, as between her and the company, from any advances of money whatever for that purpose; and, we say, as expressive of inattention as to primary liability it is much stronger than the Tennessee law.

An examination of the liens, or mortgages, provided for by the two laws, will show that they were in substance the same.

Under the Minnesota law it was required that before the issuance of the bonds the company applying should execute an instrument pledging the net profits of its road for the payment of the interest on the same; and, convey to the State its lands aforesaid, in trust, for the better security of the treasury of the State from loss on said bonds, which said deed in trust should authorize the Governor and Secretary of State to make conveyances of title to all or any of such lands to purchasers agreeing with the respective railroad companies therefor, the proceeds of all such sales to be applied to the payment of interest accruing upon the bonds in case of default of the payment of the same, and as a sinking fund to meet any future default in the payment of interest and the principal thereof when due; and as further security, an amount of first mortgage bonds on the ROADS, LANDS and FRAN-

CHISES of the company, corresponding to the State bonds issued, were required to be transferred to the Treasurer of the State at the time of the issue of State bonds. It was said by the Court, p. 302, that the delivery of these first mortgage bonds necessarily implied the execution of a mortgage or deed of trust for their payment; but, as appears in the record, such an instrument in fact was executed, and by an act of the Legislature passed on August 12, 1858, these bonds of the company were required to be drawn so that the interest and principal should mature sixty days before the maturity of the interest and principal of the State bonds.

As we have seen the lien or mortgage under the Tennessee law was not evidenced by the execution of formal instruments, but existed in the declaration of the statute that such a lien or mortgage should arise upon the issuance of the bonds and by virtue of the same. When the bonds were actually issued and received and accepted, under this condition, the lien attached and became a complete vested security in the State.

The lien was no more effective, or complete, in the one case than in the other. In this respect they were in substance the same. We have already shown, we think, that the position that the bonds themselves, under the Tennessee law, constituted the lien, is untenable.

But to concede that they did, the result would be the same, for the lien however constituted, under doctrine of the case we are considering, would inure to the use of the State, as the primary debtor, the form or mode of creating the lien, and evidencing the same, being entirely immaterial, and the inten-

tion of the transaction being paramount to all mode and form.

But, there is this striking and most important difference between the two mortgages. Under the Minnesota law, the bonds on their face showed that they were railroad bonds—the law declared them to be special bonds—and on their face they showed to what particular company they were issued, being made payable to its order, and transferable by the indorsement of its president, so that it was an easy matter to ascertain by what mortgage it was secured, thereby giving some pretense for the position that it was intended that the mortgage should inure to the benefit of the holders of the bonds, though fallacious and untenable.

The obligation of the corporations to pay the bonds was again fully declared in the remedial provisions of the Minnesota law, for it was provided that in case either of said companies should make default in payment of either the interest or principal of the bonds issued to said company, the Governor shall proceed in such manner AS MAY BE PRESCRIBED BY LAW, to sell the bonds of the defaulting company, or the lands held in trust, or may require a foreclosure of the mortgage executed to secure the same.

The Southern Minnesota Railroad Company accepted the bonds of the State under these provisions, and in the years 1858 and 1859 transferred them to Chamberlain by indorsement of its president. But the company failed to complete its road, and made default in the payment of the interest on both its own bonds and the bonds of the State.

The Governor thereupon under the act which we have mentioned, and under another passed March 20, 1860, SOME TIME AFTER THE RIGHTS OF CHAMBERLAIN HAD ACCRUED, procured a foreclosure of the mortgage of the company; and the roads, lands and franchises of the company which it covered were sold and purchased by the State. This was done in October, 1860, and the State held the property until March, 1864, when the Legislature of the State granted the property to other companies, which under the provisions of the grant, and by means of large expenditures of money, proceeded in the work of constructing the road.

We read from the opinion of the Court as follows:

"Pending these proceedings, the bonds of the State in the hands of the complainant, Chamberlain, remained unpaid, and they are still unpaid. The faith of the State, solemnly pledged for the payment of both principle and interest has never been kept. So far from keeping it, the State, as early as November, 1860, adopted an amendment to its constitution prohibiting any law, which levied a tax or made other provisions for such payment, from taking effect until the same had been submitted to a vote of the people and been adopted by them. This prohibition if not a violation of the State's pledge, conflicts with its spirit. The bonds issued are legal obligations. The State is bound by every consideration of honor and good faith to pay them. Were she amenable to the tribunals of the country as private individuals are, no court of justice would withhold its judgment against her in an action for their enforcement.

The complainant, under these circumstances, finding no relief from the pledged faith of the State, and unable to pursue any remedies at law, against her on her bonds, seeks to charge with their payment the land mortgaged by the company under the amendment of 1858, and purchased by the State under the foreclosure of the mortgage, and now held by the defendant railroad companies."

remedy, if a right he has, being in equity against the State as trustee, which can not be sued, the right could not be enforced at all.

We earnestly insist that this adjudication is in point as to the controlling question involved. If in this we are correct, then it is conclusive in this Court, for it is the established rule that in a subordinate court, the decisions of the appella'e court are considered to be of absolute authority, however much the court may differ in its conclusions, unless it is considered, which is hardly supposable, to be contrary to the constitution or common sense; and it is to be presumed that a conclusion so recently announced, after mature consideration, and so well supported by principle, will not be over-ruled and departed from by the appellate court itself. One of the great ends to be attained in the administration of law is to inspire confidence in its dispensation by keeping the course of its decisions uniform and even.

The case of Chamberlain is also a direct authority upon the question of estoppel and laches which we have made; but as we have detained the Court so long in commenting upon other questions which are involved, and which are in their effect conclusive, we will not go into this at large. If, however, these questions of estoppel and laches should be considered as material in the decision of the case, we cite and rely upon the case as an authority in support of the positions which we have taken on those questions.

An examination of the facts in this case will also show that the same objection to the legisation under the provisions of which the property was sold

might have been made as is made in the case at bar to the legislation of 1869–70, under the provisions of which the defendant paid and discharged its liability to the State, that is, that it comes within the prohibition of the national constitution against State legislation impairing the obligation of contract; but the question was not raised in argument, and seems to have been tacitly conceded as untenable.

The legislation under which the property was sold was in time subsequent to the purchase of the bonds by Chamberlain, and, therefore, after his rights, whatever they were, as a holder of the bonds had become vested. It appears that the amendment was adopted on April 15, 1858, and that the bonds were issued and received by Chamberlain in that year and the year 1859. There were two acts under which the property was sold—one passed August 12, 1858, and one not until March 6, 1860. (See the opinion.) The authority for this legislation must have been the provision in the amendment to the constitution, under which the bonds were issued, that, in case of default, the Governor might proceed to sell IN SUCH MANNER AS MIGHT BE PRESCRIBED BY LAW, which was an implied reservation of power of future legislation not near so strong as the express reservation contained in section twelve of the Tennessee law.

Although we think and maintain that Chamberlain's case is conclusive, we also cite the two cases of Wilson v. Boyce and of Wilson v. McCrellis, also reported in 2 Otto, 320–326 and note. It is true that the question of the ownership of the lien was not directly made, but the cases are important,

and are entitled to much weight because they show the construction placed upon precisely the same language upon which the complainants in the present case rest their demand, by the government of a sister State, which seems to have been acquiesced in by the holders of her bonds, and to have passed in the course of important legislation unchallenged and unquestioned through the courts of the country.

The State of Missouri issued her bonds to her railroad corporations and WHICH BONDS it was enacted SHOULD CONSTITUTE a first lien or mortgage upon the road and property of the several companies so receiving them, which is the precise language of section third of the Tennessee law, which the complainants seek to detach and isolate from the body of that section and to found thereon, separately considered a claim to the ownership of the lien. But these words, considered and construed by themselves, for in the Missouri statute they were the only words used in creating and investing the lien, and were not explained by other words as in the Tennessee law, were construed by the State of Missouri, and her officers whose duty it was to execute the law, as vesting the lien in the State, for her own exclusive use and benefit, and she accordingly enforced the same when the roads defaulted, which construction, as we have said, was not questioned. In the cases cited the parties defendant held and claimed under the construction, and the validity of their title was tacitly conceded, the only question made being as to the property which it covered.

It is submitted in behalf of the appellants that the decree of the court below should be reserved,

"so that justice, long delayed, may at last be done for the bondholders of the State of Tennessee."

We, on the other hand, respectfully submit that if justice has been withheld from the bondholders of the State of Tennessee, it has not been done by the appellee, or the other railroad corporations, of the State of Tennessee. The State of Tennessee is not before the court; but if she were amenable to the court, and impleaded, the wrongs which she may have done in her public and political capacity can not, in law or morals, be redressed by a seizure, bodily, of the private property of a portion of her citizens.

The practical effect of the relief sought by the appellants, if granted and obtained, would be such a consummation.

The opinion upon which the decree of the court below was based, was confined to the construction of the statute on its face, without any consideration of the other questions made in behalf of the appellees. We submit that the decree should be affirmed, both because of its manifest intrinsic rectitude, and upon the holdings of this court in the cause of Chamberlain vs. St. Paul City R. R. Co., 92 U. S., 299, but with undiminished confidence in both the legal and moral integrity of the other defences which have been insisted upon.

And as we commenced with the use of what we esteem a most conclusive authority as to the mode in which the statute should be interpreted, taken from the argument of Mr. Justice Stanley Mathews, in the court below, we will conclude here with

a quotation from the same able argument, in the sentiment of which we fully concur:

"On our part, we have the satisfaction of believing that our success in this litigation brings no loss to our opponents. The dismissal of their bill leaves them in possession of all the rights they had when they filed it. We deny them no relief to which they are entitled, or on which they ever founded any expectations. We leave them in the possession of their bonds, with all the rights and remedies which ever inhered in them, secured still, as they were before, by the twice pledged faith, honor and credit of the State of Tennessee," which, we will add, is all that is "nominated on the bond," and which we hope may be yet fully performed.

JAMES T. SHIELDS,
GEORGE BROWN,
AND
JOHN K. SHIELDS,
Of Counsel for Appellees.

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No. 42

Office Supreme Court U. S.
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114—663

Supreme Court of the United States

CALVIN AMORY STEVENS ET AL., ON BEHALF OF THEMSELVES AND THE OTHER HOLDERS OF INTERNAL IMPROVEMENT BONDS OF THE STATE OF TENNESSEE ISSUED TO THE MEMPHIS & CHARLESTON RAILROAD CO.,

versus

THE MEMPHIS & CHARLESTON RAILROAD COMPANY and THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY.

No. 42.

ON APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR WESTERN DISTRICT OF TENNESSEE.

BRIEF AND ARGUMENT

—OF—

D. H. & W. K. POSTON,

Of Counsel for E. T., Va. & Ga. R. R. Co. and Memphis & Charleston Railroad Company, Defendants.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

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This is a bill, by complainants, brought on the equity side of the Circuit Court of the United States for the Western District of Tennessee against the Memphis and Charleston Railroad Company and its lessee, the East Tennessee, Virginia and Georgia Railroad Company, claiming the right to enforce, as primary obligations of

the Memphis and Charleston Railroad Company to the bondholders, the bonds of the State of Tennessee payable to bearer, which were loaned to the Memphis and Charleston Railroad Company by the State of Tennessee under the general internal improvement act of February 11, 1852, ch. 151, and the amendments thereto, including those of 1854, ch. , of 1856, ch. , of 1860, ch. , and of 1867, ch. , and others.

Complainant's prayer for relief is based as well on the allegation and claim, that by said acts, as matter of positive law and contract, a specific lien and trust on the property of said Memphis and Charleston R. R. Co. was created and imposed for the protection and to secure the payment of said bonds to the holders, as on the claim, that said State bonds payable to bearer are primary obligations of said R. R. Co. directly to the holders.

The bonds in regard to which these claims are so asserted were issued by the State in 1852, 1854, 1856, 1858, 1867, and therefore embrace the authority of all the acts from 1852 to 1867.

The defendant company denies not only that it is a primary obligor on said coupon bonds of the State payable to bearer, but denies that any obligation or liability whatever ever existed *on said bonds from it to the holders, or otherwise;* it denies that any contract relation ever existed on, or in reference to said bonds between it, as debtor, and the holders, as creditors. It asserts, that by said original act of 1852, ch. 151, was authorized the creation of coupon bonds of the State of Tennessee payable to bearer, resting alone on the plighted faith and credit of the State, as primary and sole obligor; that these bonds were authorized

to be loaned to the railroad companies for sale in the markets; and the State reserved to herself, and for her sole benefit and indemnity, a specific statutory lien on the property of each company, to make sure the payment to her of the debt arising to the State from the company for this loan of her coupon bonds payable to bearer.

The defendant shows, by uncontradicted testimony, that, in fulfilling the stipulations of their contracts by semi-annual payments of interest, and annual payments on the principal, under the requirements of the act to raise a sinking fund for the State to meet her bonded liability, both the State and the companies have uniformly and practically construed the contract and debt of the company to be solely with and to the State, and that the bondholders have not only uniformly acquiesced in this practical construction for a period of fifteen to twenty years, but by positive acts in the assertion of their rights, as well as omissions to act, through a long series of years, when the most imperative and urgent reasons existed for the bondholders putting forward the claim now set up for the first time, they, in fact, sought and claimed the State to be their sole debtor, and so dealt touching their bonds and overdue coupons. During the same period the State was openly, and with the full knowledge of the bondholders, dealing with the railroad companies solely as her debtors, and the liens on their property solely as for her protection and indemnity. This course the State pursued by the action of her legislative, judicial, and executive departments until the companies paid up, in full, their entire debt to the State, making use of the assigned lien of the State to procure the means from capitalists with which to pay their debts. And the bondholders not only did not oppose

this scheme, having a full knowledge thereof, but actively and clamorously demanded and importuned its being carried out, as effecting a removal of an obstacle to settlement between them and their sole creditor, the State.

The first proposition we submit is the following:

If we look to the history of the time, and of the State, when this act, ch. 151, of February 11. 1852, was passed, and with a direct reference to which the Legislature framed the act, and prescribed the form, quality, stipulation, and parties to the bond; and look also to its paramount object in the light then appearing, and to the means adopted to accomplish that object, we will discover clearly and surely the true intent of the Legislature in using the language it did.

And that intent will be demonstrated to be, to create a negotiable bond, payable to bearer, executed by the State as primary and sole obligor, and, hence, resting for the security of its prompt payment *alone* on the plighted faith and credit of the State, both as to principal and interest; that it was a primary and paramount object of the Legislature to confine the obligation and liability to pay the bonds, to the State, and to exclude the company and its property from all contract relation with the bonds and bondholders. At the same time, for the sole benefit of the State, and to indemnify her fully, a first lien *was vested in*, *secured to* and *created in favor of the State* on the property of each railroad company to whom the bonds were lent; and the payments by each company to the State, both of principal and interest of its debts for the loan, was so fixed, in point of time, as to antecede the maturity of the State's corresponding debt to the holders of her bonds, as a measure purely of indemnity to the State.

This arrangement whereby the railroad companies were wholly excluded from all contract relation with the bondholders, and not made parties to the bonds at all, and whereby the lien on their property was given solely to the State, was to increase the value and negotiability of the bonds; because it has been found by actual experience that such straight State bonds resting on the plighted faith and credit of the State, as primary and sole obligor, were of more value, and sold for a higher price than bonds expressing the primary obligation of the company secured by a first lien on their property, and expressly guaranteed by the State as indorser and guarantor.

To fully comprehend the situation and the reasons and considerations that prompted the Legislature, let us endeavor to group and consider the history of the State, and the circumstances surrounding the Legislature at the time of the passage of the act of Feb. 11, 1852, ch. 151, and what defects, if any, experience had shown to exist in the operation of any former law.

The State of Tennessee, with an area of 45,600 square miles, and a total population, June 1st, 1850, of 1,002,614, of fertile soil, and abounding in mineral resources equal to those of any State in the Union, had not a yard of railroad communication connecting different sections of the State, or with outside markets. She had outstanding less than $4,000,000 of her bonds. These were selling above par, from 3 to 8 cents on the dollar. Some of these bonds had been issued for purely State purposes, and others in aid of internal improvements, but all these bonds were straight State bonds, whose payment was secured by the plighted faith and credit of the State alone. The State

had also lent its credit in a different form, that is, under certain acts the State authorized certain railroad companies to issue their own bonds, secured by first mortgages on their property respectively, and endorsed and guaranteed by the State. It had been ascertained, that while straight State of Tennessee bonds, whether issued for purely State purposes, or as aid to internal improvements, sold readily at from three to eight cents on the dollar above par, these bonds guaranteed by the State, secured by the primary and express obligation of the company to the bondholder and a first mortgage and lien on all property of the company, did not sell for as much money as the straight State bonds resting for payment alone on the plighted faith of the State. This defect and mischief it was sought to remedy by the act of February 11, 1852, ch. 151. That is to say, in order to obtain the highest price, and thus give the greatest amount of aid to the infant companies, the Legislature, by the act of February 11, 1852, created a bond of the State as primary and sole obligor, but, at the same time, secured to herself the obligation and first lien of the railroad company on all its property to indemnify and reimburse herself.

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See deposition of V. K. Stevenson.
Answer 5 and 26 in chief. Record pp. 699–705
Answer 13, 14 and 15 to cross-interrogatories
708.
See also deposition of Samuel Tate, folios 4, 5, a
6, p. 686.
See also deposition of Campbell Wallace, folios 1
19, 20, 21, Record pp. 739–740.

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An obvious and satisfactory reason for this preference of buyers for State of Tennessee bonds existed: the railroads

were all incomplete adventures, wholly dependent on the success of an untried future. The credit of the State was established, and no fears were or could be entertained of her promptness and good faith. No one can doubt the testimony of Samuel Tate, viz.: "The purpose, as I understood it at the time, of the railroad men of Tennessee, in shaping the passage of the General Improvement Act of 1851–2, was to get it in the most available shape to iron and equip their road; and the State's credit was much better than any outside company's; even with the State's endorsement they preferred, and so shaped the legislation as to get straight State bonds issued in order to get more money for them; besides this, they preferred making their liabilities and dealings with the State alone, in paying their interest and sinking funds; and supposed they had accomplished this in the passage of the act of 1851–2."

This is the testimony of V. K. Stevenson and of Campbell Wallace.

As to the State credit, and also the objects contemplated hese acts, see the following documentary evidence:

e message of Gov. N. S. Brown: "It is gratifying to of pride of character as a people that hitherto all our pro ic engagements have been promptly and faithfully St . The credit of the State has hitherto escaped any re- se tion either at home or abroad."

Gov. Trousdale, Oct. 9, 1851: "Should the credit of the State not be impaired by the issue of bonds to an amount beyond which it can safely go, the bonds will sell in the market for a premium, which might be applied in payment of interest."

Gov. Campbell, Oct. 28, 1851, recommends aid "to any needed extent which will not seriously embarrass the State treasury or cripple her *credit*."

(This recommendation is followed by the act of February 11, which provides that none of the bonds shall be sold below par, a clause showing confidence in the credit, and a resolute purpose to maintain that.)

The solicitude manifested here is not that bonds cannot be sold without collateral security, but simply lest depreciation may befall or excessive issues may occur.

Second. These messages show an earnest desire to secure the State against loss.

In the message of Gov. Trousdale, Oct. 22, 1849, this passage is found: "I feel it my duty also to recommend that before embarking the credit of the State in any work, you satisfy yourselves fully that the work, when completed, will yield a fair profit upon the capital invested, and as the best guarantee on this point, that the State shall only co forward with her aid after individual capital has been barked to such an extent as to insure the State ag ultimate loss."

In the message of Oct., 1851, it is said: "We satisfied of the benefits which would result to the from a well organized system of railroad communica But the great question is, can the State safely extend aid to individual enterprise, as well as accomplish this sirable object? * * Perhaps the better plan would be to grant liberal charters to companies. * * Let them, by their money and labor, prepare the road for the rails and fixtures, and then call upon the State for aid. Should

it appear from investigation that the improvements thus made when finished would be profitable, let a lien be taken *by the State* upon the whole stock of the company in the road as completed, and upon the rails and fixtures, *to save the State from loss;* then let the State *loan her credit in State bonds.* * * In this way works of internal improvement may be constructed and put in operation, which would defray the expenses of building and enrich the individual stockholders, and the State be subjected to no cost, and but little risk in the aid she offers in the construction. I recommend to your favorable consideration each of the roads specified above as meriting all the aid the State can safely give, while at the same time the *interest of the State should be strictly guarded*, and all necessary steps taken *to secure her against loss.*"

Gov. Campbell, Oct. 28, 1851, says: "It does seem to be a high duty of the State to loan her credit, at least toward ironing and equipping the roads, after they have been prepared for the iron, upon ample indemnity by the individual stockholders against loss, and to any needed extent which will not seriously embarrass the State treasury or cripple her credit."

In a protest of members of the Legislature the solicitude of the protestants is to aid only such roads as "by their prospect of profits and proposed mortgages will secure the State against liability to loss." They discuss the basis of security, and object to increased aid, by which the security is lessened.

Moreover, other facts and circumstances existed at the time of the passage of this act of 1851–2, ch. 151, which throw light on its provisions and render their meaning clear.

The State then had outstanding from three to four millions of dollars of her coupon bonds, some of which had been issued for purely State purposes, as for the building of her capitol, the payment for her stock in several banks, and in certain turnpike companies, and for other purposes. All these bonds bore a uniform price. The State contemplated, by this act of February 11, 1852, ch. 151, issuing several millions more, as loans to the fifteen railroad companies named in the act. It was known to all that these railroads were novel and untried experiments; some of which, at that early period, had failed, others were languishing for want of means, and all were struggling with difficulties that none knew or could foretell they would surmount. The Memphis and Lagrange R. R. Co. had failed and had been sold out with the consent of the State to the Memphis and Charleston R. R. Co. It was an object of paramount importance to the State that she should lend her aid to her system of projected railroads in such manner as to make that aid productive of most benefit to them. Their bonds, with liens on their unfinished roads, even if guaranteed by the State, would be regarded as slow, uncertain securities; at least, as to time of payment; because the State, as surety, would probably require the principal debtor and its property to be exhausted before she would undertake to provide for meeting her secondary liability. Straight State bonds of Tennessee, without any support, commanded more than their face value in the money markets of the world; because the State of Tennessee never failed up to the war to meet all her obligations with a wise and resolute good faith, and the utmost promptness. It was evident, therefore, that the credit of her bonds could only be preserved at the same uniform

high standard, by keeping them free from the doubtful credit of the various roads. It was equally clear that she would add to the certainty of this uniformity of value, secure, with greater certainty, reimbursement to herself, and, at the same time, increase the facility, and consequent ability of the roads in making payment to her, by issuing to all the roads, her own coupon bonds of the same character as those already outstanding, and granting the privilege, to all the roads, of paying to her, not only the identical bonds issued to the company making the payment, but any of her bonds of the like character. Such a scheme was embodied in the act of 1852, ch. 151, and in its essential and paramount purpose, is a total negation of any relation of creditor and debtor between the bondholders and the companies.

Having thus looked into the history of the State and its condition at the time as interpreted through the proper legislative and executive channels, we are in a little better condition to put a proper construction upon the acts of 1851–2, and other subsequent acts granting State aid to works of internal improvement, and see what the objects were that were sought to be accomplished thereby.

The true rule for the interpretation of a statute is thus stated by Mr. Justice Strong, in Platt v. Union Pacific R. R. Co. 9 Otto, page 60 :

"*In construing a statute, we are to look at the state of* "*things then existing at the date of the passage of the statute,* "*and in the light then appearing seek for the purposes and ob-* "*jects of the Legislature in using the language it did, and we* "*are to give such construction to that language, if possible, as*

"*will carry out the legislative intentions*," * * * and on page 63 and 64 the same judge says:

"There is always a tendency to construe statutes in the "light in which they appear when the construction is "given. It is easy to be wise after we see the results of "experience. *In endeavoring to ascertain what the Legisla-* "*ture meant, we must, as far as possible, place ourselves in the* "*light that the Legislature enjoyed, look at things as they ap-* "*peared to it, and discover its purpose from the language used* "*in connection with attending circumstances.*" "The question "is not to be answered by reference to definitions given in "dictionaries."

See also 7 Cush. (Mass.) 53 to 59.

5 Mich. R., 114; 97 Mass. R., 466; 35 Cal. R., 576.

In United States v. Union Pacific R. R. Co., 1 Otto 72, Mr. Justice Davis declares the rule as follows:

"But courts, in construing a statute, may with propriety "recur to the history of the times when it was passed; and "*this is frequently necessary, in order to ascertain the reason,* "*as well as* THE MEANING OF PARTICULAR PROVISIONS IN IT." Again at p. 81: "No argument can be drawn from the "wisdom that comes after the fact. Congress acted with "reference to a state of things believed at the time to "exist, and in interpreting its legislation, no aid can be "derived from subsequent events." The court again say, "the obligations of the company must depend upon the "true meaning of the enactment itself, viewed in the light "of contemporaneous history." pp. 81–82.

On page 178 of Potter's Dwarris on Statutes, paragraph third, is the following statement of the rule:

"In applying rules for interpreting statutes to questions

"on the effect of an enactment, we can never, says Vat-
"tell, safely *lose sight of its object. That must be the truest*
"*exposition of a law which best harmonizes with its design, its*
"*objects,* and its general structure."

Again, in same book, at page 184, second paragraph:
"As a primary rule, it is to be collected from the words;
"when the words are not explicit, *the intention is to be gath-*
"*ered from the* OCCASION *and* NECESSITY *of the law, the defect*
"*in the former law,* and *the designed remedy* — being the
"causes which moved the Legislature to enact it."

Also, on same page, paragraph four, substituting the words "*former law*" for "*common law.*"

The resolutions of the Barons of the Exchequer in Heydon's case were the following:

"1. What was the former law before the making of the
"act?

"2. What was the mischief and defect against which
"the former law did not provide?

"3. What remedy the Legislature has provided to cure
"the defect of the former act?

"And 4th, the true reason of the remedy."

CONSTRUCTION OF ACT OF 1851-2.

With these matters and lights before us, and with a great State, practically cut off from the markets of the world, with no facilities for travel or commerce, it was no wonder that great solicitude existed for the passage of some laws which would facilitate these objects and secure to the State the benefits that have resulted therefrom. Now let us proceed with the interpretation of these acts and see what

was sought and intended to be done by the Legislature, and the manner and means they intended should be adopted and employed in accomplishing it.

An established rule of construction is, that we must look to the enacting clause, or section, which creates the rights and obligations under consideration, and defines them, to ascertain what those rights or obligations are, rather than to subsequent clauses and sections attaching some conditions, qualifications or incidents thereto.

The reason of this is, that, in the enacting clauses or sections, the mind of the legislator was directed attentively to the nature, character and qualities of the rights and obligations to be created thereby; while in subsequent sections his mind was directed to the conditions, incidents and provisos, rather than to defining the thing already defined and set forth.

To apply this rule: The first section of ch. 151, act of February 11, 1852, is the enacting clause, which sets forth the nature and qualities of, and the parties to, the obligations about to be created, as well as the party in favor of whom the lien is to be created.

The obligations to be created and issued are *the coupon bonds of the State of Tennessee* alone; no word, term or clause prescribes any liability or obligation of the company on this bond; the sole and primary obligor designated is the State. By this section the Legislature created an express contract with the State as the sole primary obligor. It also provides, as a condition precedent to the issue of these bonds by the State to the company, that there shall exist on the property mortgaged no other liens whatever,

except those created in favor of the State by the acts of 1851–2.

Having thus, in the enacting clause, defined accurately the nature, character and qualities of the bonds and the parties to them, and declared that the lien is to be a first lien in favor of the State; and then the fixed amount of the bonds to be issued by the State to the company, the conditions and mode of delivery; the next or second section provides that the proceeds of the sale of the bonds shall only be devoted to ironing the road; and to secure this result, the Governor is empowered to appoint a State Commissioner to act with the President of the Company in negotiating the bonds, and applying the proceeds to the required purpose. Thus this second section provides for the sale of the bonds by the company to which issued, and the application of the proceeds to a declared purpose.

A compliance with the provisions of the act in the issuance of the bonds to the company would create a debt from the company to the State for the amount of the bonds issued.

The third section then follows, declaring when the lien shall arise, in whom to vest, and for what purpose: "As "soon as the bonds are issued, they shall constitute a lien "upon the property of the company, and the State of Ten- "nessee, upon the issuance of said bonds, and by virtue of "the same, shall be vested with said lien or mortgage "without a deed from the company, for the payment of "said bonds and interest as the same becomes due."

First let us ascertain the ordinary, proper and grammatical sense of the language of this section.

"As soon as the bonds shall have been issued *they shall* "*constitute a lien on all the property of the road.*"

The word "*constitute*" has three meanings: "1st. To build up, to establish, or to institute. 2d. To form or compose as an element. 3d. To appoint, to depute or to empower." Webster's Dictionary.

As used in the clause above quoted from the 3d section of this act, neither the second nor the third meaning can be attributed to it. It must be construed here in the first sense, *i. e.*, "*to build up, to establish*, or institute;" it will then read: "As soon as the bonds shall have been issued, '*they shall* constitute,' i. e., establish, or build up, or institute 'a lien,' and the State of Tennessee, upon the issuance of said bonds, and, by virtue of the same, shall be vested with said lien." This is all in strict accurate accord with the provisions of the first, the enacting section; but, say our adversaries, the lien rests in the State by the express terms, "*for the payment of said bonds and interest, as they may mature, and this means for the payment of the bonds and interest to the holders.*"

We reply, if your interpretation were correct upon a literal construction of the words, it is not correct, if you take into view and harmonize it with the provisions of the enacting or first section. By that section bonds were created *which were the bonds of the State, as primary* and *sole obligor*, promising to pay the holder $1000 forty years after date, and the interest every six months. This obligation the State of Tennessee assumed and was required to perform, and the company was no party to this bond. But by the issuance of the bonds to the company a debt arose

to the State from the company, and both the first section and third section declared to be created, *in favor of the State*, and *to be vested in the State*, a lien on the company's property for the payment of these bonds and interest. The natural, reasonable, and consistent interpretation is, to construe this to be an obligation of the company to pay to the State, the creditor of the company, and not to the bondholder, between whom and the company is no privity of contract.

For an identically similar form of words and a like construction, see 91 U. S. R. 80–83.

But we pass to another rule of construction and its application to these same terms.

The rule is: Verba generalia restringunter ad habilitatem personæ vel, ad aptitudinem rei.

General words may be aptly restrained according to the subject matter, or persons to which they relate. For all words, whether they be in deeds, or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person.

In accordance, likewise, with the above maxim, the subject matter of an agreement is to be considered in construing the terms of it, and they are to be understood in the sense most agreeable to the nature of the agreement. If a deed relate to a particular subject only, general words in it shall be confined to that subject. The following are illustrations of this rule: If I grant "*common in all my lands*" in D, if I have in D both open ground and closed, it shall not be stretched to common in my closed grounds, much less in my gardens or orchards. If I grant to J S

an annuity of £10 a year, for past and future counsel; if J S be a physician, this shall be understood of his advice in physic; and if he be a lawyer, of his counsel in legal matters. And, in accordance with the same principles, a right of common of turbary claimed by prescription and uses has been held to be restrained to those parts of the locus in quo in which it could be used.

Broom's Legal Maxims, p.
Potter's Dwarris on Statutes, pp. 174, 175.
Bacon's Maxims, p. 52.

In Brewer v. Blougher, 14 Peters 178, Taney, C. J., says: "It is undoubtedly the duty of the court to ascertain "the meaning of the Legislature from *the words used in the* "*statute*, and *the subject matter to which it relates;* and *to re-* "*strain its operation within narrower limits than its words* "*import, if the court are satisfied that the literal meaning of its* "*language would extend to cases which the Legislature never* "*designed to embrace in it.*"

Now let us apply this rule.

The first section prescribes three conditions precedent to be performed by the company before the bonds can be issued; good and solvent subscriptions to its capital stock satisfactory to the Governor, sufficient to prepare the whole main trunk line for the iron rails; then, second, "on a section of the road of thirty miles being so pre- "pared with notice to the Governor;" and third, that said section nor any part thereof is subject to any other lien than those created in favor of the State. On these conditions being performed, the Governor shall issue $8000 (per mile for said section) of the coupon bonds of the State bearing 6 per cent. interest, payable semi-annually, and the bonds to mature in thirty to forty years.

One of these conditions precedent is, "*that the section of* "*the road is not to be subject to any other lien than the liens* "*created in favor of the State by the acts of 1851–2. The* "*liens to be guarded from all conflict are the liens in favor of* "*the State created by the acts of 1851–2.*"

The obligations prescribed to be issued to the company are "*the bonds of the State.*" The second section restrains "the use to which the proceeds of the sale of the bonds "shall be applied to ironing the road," and to secure this the Governor is authorized to appoint a Commissioner to act with the President in negotiating the bonds and applying the proceeds to the designated purpose. In declaring the use to which the proceeds of the sale of the bonds shall be alone devoted, the Legislature used the word "*bonds*" in the sense of the "*proceeds of the sale of* "*the bonds,*" for the language is: "*The bonds* shall not be "used for any other purpose," &c. Here *bonds* is used to represent the proceeds of their sale, as the same word *bonds* is used in the third section in the sense of the debt due the State.

But this is a deviation from the argument proposed now in the application of the rule last above quoted.

The terms used in the third section, and that are relied on by the adversary counsel as giving a lien to the bondholders on the property—as imposing an obligation on the company to pay the bonds and interest to the bondholders, are: "As soon as the bonds are issued, '*they shall con-* "'*stitute a lien,*' '*for the payment by said company of said* "'*bonds.*'"

Taken by themselves, these two clauses are general in their terms; but by restraining them to the subject matter,

that is, *to bonds of the State loaned to the company, but on which the State is primary and sole debtor*, and *to the lien declared to be in favor of the State*, the proper and true meaning of the two clauses is reached. What is this subject matter? It consists of two things, "the State bonds, "executed alone by the State, payable to bearer, lent to the "company for sale, but containing neither in nor upon "them any obligation of the company to pay;" and secondly, the lien in favor of the State created by the acts of 1857–8, on the property of the company indebted to the State for the loan. Restraining the words, "*they shall con-* "*stitute a lien*," and "for the payment by said company of "said bonds and interest," so as to make them fit the subject matter, *i. e.*, *the State bonds*, and the liens in favor of the State on the property of her debtor company, and we reach a fair, reasonable, and harmonious construction, to-wit: That the bonds, on being issued by the State to the company, constitute, or establish a lien in favor of and vested in the State for the payment to the State by the company of the amount of the debt due to the State for the State bonds lent to the company and accruing interest.

The propriety of this construction is manifest and acquires additional force from the following considerations:

If the Legislature had intended to create an obligation on the company to pay to the bondholders, or a lien on its property to secure such payment to the bondholders, of the principal and interest of the bonds, the obvious, natural, proper, simple, usual and businesslike way of effecting such purpose would have been to prescribe a bond whose terms, form and parties would have expressly imposed this liability and lien on the company in favor of the bond-

holders; so, too, if they had intended to make the State only secondarily liable on the bonds, as surety of the company, they could by apt words have provided for such an obligation in the enacting section, and not created a bond whose primary and sole obligor is the State, according to the express terms of the bond.

By creating a bond, as the provisions of the first section do, whose express stipulations, form and parties make the State the primary and sole debtor of the bondholder, and wholly leaving out the company as a party to this bond according to its terms, the Legislature exclude any contract that might arise by implication from the company to the bondholder.

The Legislature had the absolute power and discretion to mould the obligations they were creating as they chose; hence, to suppose they intended to make the State only secondarily liable, as the surety of the company, and yet create an obligation by whose express form and terms the State was made the primary and sole obligor, is too unbusinesslike to be entertained by the legal mind.

So, too, it is unjust to the intelligence of the Legislature to suppose that they intended to make the railroad company the primary obligor on the bonds, or impose any liability or lien on the company in favor of the bonds and bondholders, and yet, in the enacting section, wherein the nature, form, qualities of, and parties to those bonds were declared, they prescribe no such liability of the company in reference to the bonds.

A number of the decisions of the Supreme Court of the United States, and several of the States, present *all fours*-

illustrations of the use, in statutes and contracts of this same form of expression, and of constructions uniformly made adopting our view, "that a promise to the creditor "of the promissor to pay the debt of the promissee due to "his creditor, is a contract with the promissee, and not "with his creditor, except in the case of a novation, or "where the contract relation otherwise existed between "the promissor and the creditor of his promissee."

We cite for this proposition the following cases:

United States v. Union Pacific R. R. Co., 91 U. S. 81–85.

The act of Congress of 1862, granting aid in United States bonds to the Union Pacific R. R. Co., defined the obligations of the railroad company by the 6th section. The bonds were to be coupon bonds of the United States as prescribed by the 5th section; the 6th section defined the obligations of the company. This section required: 1st. "THAT SAID COMPANY SHALL PAY SAID BONDS AT MATU- "RITY;" 2d. "Shall allow the Government to retain the "compensation due the railroad company for services ren- "dered, and APPLY THE SAME TO THE PAYMENT OF THE BONDS "AND INTEREST UNTIL THE WHOLE AMOUNT IS PAID;" 3d. "To "pay over to the Government 5 per cent. of the net earn- "ings of the road, to be appropriated TO THE PAYMENT OF "THE BONDS AND INTEREST."

These clauses were construed, in this case, to impose upon the company the obligation to reimburse the Government, both the principal and interest of her bonds loaned to the company.

The same construction is made, 9 Otto R. 398, in the Union Pacific R. R. Co. v. the United States. Mr. Justice Bradley's opinion.

Also see 22 Wallace R. 105. Opinion by Mr. Justice Strong. Maryland v. Railroad.

The mortgage in this case was by the company on a loan of the State bonds, and was "*to secure the payment of three years of the interest on the bonds created by the act.*" p. 107. "*This was a stipulation for indemnity. It covered all that the State was required to pay, as interest on her sterling bonds.*" p. 115.

See also 2 Otto 299, Chamberlain v. St. Paul & Sioux City R. R.

The report of this case does not set out the precise terms of the mortgage, but the terms, as required by the amended constitution of Minnesota, under which the mortgage was made, are, "that each company (receiving the bonds) "*shall make provision for the punctual payment of the princi-*"*pal and interest which shall accrue thereon, in such manner* "*as to exonerate the treasury of the State from any advances* "*of money for that purpose.*"

The court held, "*This deed and mortgage were not intended* "*to create a trust in favor of the holders of the State bonds.* "*The State was primarily liable to the holders of the State bonds;* "*and it was only as between her and the company that the rela-*"*tion of principal and surety existed.* Whatever right the "plaintiff had to compel the application of the lands to "the payment of his bonds, *it was not a legal right arising* "*out of any positive law or agreement of the parties.*"

In the North Missouri R. R. case, 31 Mo., 139, the act of Missouri was construed to give power to the State to deal with the lien and to release it without consideration. The statute reserving that lien has many points of similarity with that of Tennessee, yet it contains indications

much more favorable to the bondholders. It makes the bond special, and designates them "the North Missouri R. R. bonds;" required them to be registered in the *Auditor's* office; made them payable to the *order of the company*, transferable by the endorsement of the President, and his act to be considered the *act of the company; and a copy of the act to go with the bond.*

It required the company to make provision for the punctual payment of the interest, and the punctual payment of the bonds, in *such manner as to exonerate the treasury from any advances*, and pledged the tolls and income for the payment of the interest; made no provision for anticipated payments, as in the acts of 1852; no provision for sinking fund, and no reservation of power to enact such law as may be deemed necessary to secure the State; no receivership and no present provision for paying the interest out of the treasury. Yet it was held a lien which the State could dispose of, and the Legislature did accordingly release the lien.

In Murdock v. Woodson, Gov., 2 Dillon, upon a like statute granting aid to the Pacific R. R., the very question made here was presented to Judge Dillon, p. 206. He says: "It is next urged that the statutory lien in favor of the State was reserved by it, not exclusively for its own indemnity, but for the benefit of the holders of its bonds, and therefore the State, holding the lien merely as trustee for its bondholders, could not release such lien while its bonds were outstanding, as they still are. None of the holders of these bonds are here, and it is not needful that we should inquire what equities they might have should the State refuse to pay them, and should they apply for relief

against the railroad company or its property. I am inclined to think, however, that the form of the transaction indicates the intention of the parties. The State issued its bonds, and these were negotiated and taken upon the *State's faith and credit, without any accompanying security.* To indemnify itself, the State provided for and received a mortgage upon the road of the company, and a pledge of its net tolls and income. Then comes the further provision, *that the companies shall punctually pay the interest and principal of the bonds*, but if they fail to do so, the State may sell the road to others, or buy it in itself, to be thereafter disposed of as the Legislature may direct."

"It could not be maintained, we think, that if a sale were made by the State to a third person that he would take it subject to a lien in favor of the holders of the bonds of the State. Such a view seems to be inconsistent with the provisions of the act under which the aid was given, and the lien reserved to the State, with the provisions of the fourth and fifth sections of the constitutional ordinance, as expounded by the Supreme judges, and with the entire State legislation on the subject of disposing of roads purchased by the State under the lien reserved to it. The judges, in their answer to the Governor, distinctly say that when the State becomes the purchaser of the railroad under the lien reserved, both the lien and the former company are extinguished. The State remains liable for her own bonds and owns the railroad, and the State may sell it without reserving a lien for the whole indebtedness of the former company, but only for the unpaid balance of the purchase money." 37 Mo., 129, 134.

This case was taken to the Supreme Court of the United States, and there affirmed without any notice being taken

of the point that the bondholders were interested in the lien, 22 Wal., 351, when to have held to the construction now claimed by the complainants would have been fatal to the power of the State to deal with the property and lien.

These cases, just cited and quoted from, base their conclusions as to the proper construction of these peculiar phrases, on the proposition, *that no contract relation existed between the railroads and the holders of the State bonds*, to support the construction that the obligation imposed by the statute or contract on the company to pay the bonds was a promise or undertaking directly to the bondholder.

There are other well considered cases holding the same doctrine—i. e, that when A promises B to pay the debt of B to C, on a consideration moving from B to A, C is not a party to the contract, nor to the consideration, and no special fund is placed in A's hands to pay C with; then C has no legal or equitable right or interest in this contract, and cannot sue on and enforce it, for want of this contract relation. It is not a contract between A and C at all, no more than a promise of A to lend B money to pay his debt to C would be.

Let us now see how far this rule of law is applicable to the statute under consideration. We say the act of 1851–2, ch. 151, did not create the relation of debtor and creditor between the railroad company to whom the bonds were loaned, and the holders of these bonds. By the express terms and form of the bonds created by the act the only obligor on the bonds is the State; and the company became the debtor of the State by accepting a loan of the bonds, and as a matter of legal implication, as well as by

the statute, was required to pay the State and to secure such payment by the statutory lien.

It must be kept in mind that in no part of the statute is the railroad company required to become a party obligor on the bonds; they are required to be the coupon bonds of the State, and to be issued for sale. In fact, they were all issued payable to —— or bearer; and all passed from the railroads without their endorsement, or any other contract or stipulation, except sale and delivery. This was the course with every bond from 1852 to 1869. We may then take it as conclusively shown that the statute provided for the creation of State bonds payable to bearer, on which the State was the primary and sole obligor; and that in pursuance of the statute State bonds payable to ——— or bearer, were issued and loaned to the railroad companies, and by them sold and delivered to purchasers. The obligation assumed by the railroad company by accepting the loan of such bonds, and selling and delivering them to purchasers, was that of debtor to the State to the amount of bonds and accruing interest, as they matured; but as to the purchaser or any subsequent holder, they assumed no liability in the absence of an express contract, except the implied one that they owned the bonds when they sold them, and that the bonds were not forgeries.

2 Otto R., 447. A. D. 1875. Opinion by Mr. Justice Swayne.

Otis et al. v. Callum, Receiver.

Suit by Otis v. Callum, as Receiver of the First National Bank, to recover from the receiver the amount paid to the bank, $12,852, for eighteen bonds of $1000, each payable to bearer, issued by the City of Topeka under two acts of the Legislature of Kansas. After issuance, the bank

bought and sold them to plaintiff for $12,862. The Supreme Court in 20 Wallace, 655, Loan Association v. Topeka, held the Legislature had not the power to pass the acts, and the bonds were, therefore, void. No fraud, no warranty, no guaranty was alleged or proved against the bank. Held: "The plaintiffs in error got exactly "what they intended to buy and did buy. * * * * "Such securities throng the channels of commerce, which "they are made to seek, and where they find their market. "*They pass from hand to hand like bank notes. The seller is* "*liable ex delicto for bad faith; and ex contractu there is an* "*implied warranty on his part that they belonged to him, and* "*that they are not forgeries.* WHERE THERE IS NO "EXPRESS STIPULATION THERE IS NO LIABILI- "TY BEYOND THIS."

In the case at bar only the straight bonds of the State were offered for sale, and the liability of the State thereon and therefor has never been questioned.

Now, there can be no distinction here between the company to which such bonds are issued for sale, and a subsequent purchaser or holder. The buyer gets from the company, as he would from a subsequent holder, exactly what he intended to buy and did buy. The first holder and seller, the company, sells and delivers the bond just as a subsequent holder and seller does, and must incur the same liability, and no more, under the simple contract of sale and delivery.

By the act of accepting the loaned bonds, the company became indebted to the State, and by giving the lien to the State, and by agreeing to the terms of the statute, that this lien is vested in the State for the payment of said bonds

and interest, it creates a lien in favor of the State to secure its reimbursement.

But the position we are now urging is that when the company sold the State bonds payable to bearer to any one, it thereby assumed no contract relation to the purchaser; it did not by virtue of such sale become an obligor on the bond.

This proposition is involved in and assumed by the Supreme Court in 91 United States R, 82–85, for there the court held the liens, mortgages and pledges of the Union Pacific R. R. Co., although made *to secure the payments of the bonds*, were pledges to the Government to reimburse it. At page 85, in the second paragraph, Mr. Justice Davis, delivering the opinion of the court, announces incidentally this same want of contract relation or privity of contract between the railroad company and the holders of the United States bonds issued to that railroad company, as follows: "If the language used is taken in its natural and "obvious sense there can be no difficulty in arriving at the "meaning of the condition, '*to pay said bonds at matu-*"*rity.*' * * * * *The bonds in question were* "*the bonds of the United States, promising to pay the* "*holder of them $1000 thirty years after date, and the* "*interest every six months. This obligation the Government* "*was required to perform.*"

He then proceeds by elaborate argument to show that the words, "*to pay said bonds at maturity*," mean to pay both principal and interest to the Government at the maturity of the bonds, and not to pay the interest as it accrues. Though this was not a contest by or on behalf of the bondholders, yet it is a direct holding *of a want of*

priority between the railroad company and the holders of the United States bonds issued to that company. It is based on the form of the transaction as prescribed in the fifth and sixth sections of the act of Congress of 1862. The bonds of the United States as prescribed are payable to bearer and express *the obligation to pay* solely of the United States. Hence the railroad company's obligation as prescribed and defined in the sixth section, although in terms, "*that said* "*company shall pay said bonds at maturity*," was construed to be an obligation solely to and for the benefit and indemnity of the United States.

92 United States R., 299. A. D. 1875. Opinion of Mr. Justice Field. Chamberlain v. St. Paul & Sioux City R. R. Co.

In this case, at page 304, the counsel of the plaintiff "*insisted that notwithstanding the form of the transaction, the* "*railroad company was the principal debtor on the State bonds* "*issued to the company, and the State was only the surety and* "*accommodation maker of the State bonds.*"

Mr. Justice Field, delivering the opinion of the court, in response to the above proposition of plaintiff's counsel, said: "*The State was primarily liable to the bondholders, and it* "*was only* as between her and the company that the rela- "tion of principal and *surety existed.*" And further: "That "whatever might be the right of the bondholder, it was "one resting in equity only; *it was not a legal right arising* "*out of any positive law or agreement of the parties. It did* "*not create any lien which attached to and followed the prop-* "*erty.*" These were State bonds issued to the company, "and the condition of the mortgage, as required by the amended constitution of Minnesota was: "That each

"company (receiving bonds) shall make provision *for the* "*punctual payment and redemption of all bonds issued and* "*delivered as aforesaid to said company, and for the punctual* "*payment of the interest thereon, in such manner as to exon-* "*orate the treasury of the State from any advances for that* "*purpose.*"

Here again we have most clearly a denial of *any contract relation* or *privity of contract* between the holders of the State bonds and the company, and this, too, in a case where the statute required the company to endorse the bonds, and the company did actually endorse them.

The other cases to which we shall call attention were actions at law, but the grounds of the decisions are that the respective transactions did not give rise to nor *establish any contract relation at all between the State bondholders or creditors of the promissee, and the company or promissor.*

24 Grattan (Va.) R. 294. A. D. 1874. Opinion of Anderson, J. Stuart v. James River and Kanawha Co.

Action of debt on a bond of the State of Virginia for $15,000, by Stuart, as holder, against the James River and Kanawha Company. Complaint dismissed on demurrer. An act of the General Assembly of Virginia, passed in March, 1862, authorized the issuance to the James River and Kanawha Company of $200,000 of the registered bonds of the State of Virginia, on condition of the company's executing a bond in the penalty of $400,000 to return, in like registered bonds of Virginia, the amount of bonds issued to it with interest thereon, within six years after the date of the bonds. The amount of $180,000 of State bonds were issued to the company under this act.

The company failed to return the like amount of such bonds in the six years from date of bonds. On the 1st of March, 1867, the Legislature of Virginia passed an act authorizing said company to borrow $750,000 of money upon its own credit, and to execute a mortgage on its property and franchises to secure the payment of such loan; this act contained a proviso, "that the company "should recognize the $180,000 of State bonds received by "it, under the act of 1862, as a part of the $750,000 of "debt, and that the company might discharge this $180,000 "of bonds by paying them, or delivering to the holders of "said bonds an equal amount of registered State bonds "issued prior to the 17th of April, 1861."

This suit was on one of the bonds of the $180,000 issue; the amount of the bond sued on was $15,000, with accrued interest.

Although the company had duly executed the required mortgage for $750,000, under the act of 1867, it had not paid this bond, as required by the act.

The question decided by the court on demurrer to the declaration alleging the foregoing facts was, "Did the act "of March 1, 1867, create a contract or liability on the "part of the company directly to and for the benefit of the "bondholders?"

"The court held, it did not; that it was a contract "between the company and the State, to which the bond-"holders were not parties; and between them and the "company there was no privity of contract; that the act "was designed to benefit the State by calling in her bonds "for $180,000, and, to that extent, extinguishing her liabili-"ties; that there was no liability of the company to the

"holders of the bonds; that they were purchased, undoubt-
"edly, on the faith of the Commonwealth, and not upon
"that of the company. The holders when they purchased,
"looked alone to the Commonwealth for payment, and not
"to the company. The credit of the company could not
"have entered into the consideration of the purchaser, and
"the holder had no right to look to the company for pay-
"ment. There was no relation of debtor and creditor
"between the company and the bondholder; and that the
"last act was for the benefit of the State, and did not cre-
"ate the relation of debtor and creditor between the com-
"pany and the bondholders." pp. 298, 299.

On page 297, the court start out by announcing, "that
"at common law an indenture, or deed *inter partes*, is only
"available between the parties to it and their privies,
"though made for the benefit of others. And though this
"rule does not apply to deeds poll, yet, it must manifestly
"appear that the covenants were made for the benefit of
"the parties suing thereon."

Let it be observed, that, under the act of 1862, the $180,000 of State bonds were issued to the company, and it was expressly on the condition, "*that the company should "return to the State the amount of bonds issued to it with inter-"est thereon.*" See near bottom of p. 297 and top of p. 298.

And construing this act of 1862 and this stipulation (in the second paragraph, p. 299), the court declare: "There "was no liability of the company to the holders of the "bonds. They were purchased undoubtedly upon the "faith of the Commonwealth, and not upon that of the "company." And the court base their denial of any privity of contract arising under the act of 1867 between the

company and the bondholders on the proposition that there was no such privity under the act of 1862 under which the bonds were issued.

8 Otto R., 123. A. D. 187–. Opinion of Strong, J. National Bank v. Grand Lodge.

The Masonic Hall Association, of St. Louis, issued in June, 1869, several hundred thousand dollars of its bonds to pay for a lot of ground in St. Louis and to erect a hall thereon.

The Grand Lodge of Missouri, on the 14th of October, 1869, resolved to assume the payment of $200,000 of these bonds, then outstanding, "provided that stock should be "issued to the above amount by the Masonic Hall Associa- "tion as the said bonds are paid."

The Second National Bank of St. Louis sued the Grand Lodge on this assumption to compel the payment of certain coupons from a part of said bonds. Mr. Justice Strong, delivering the opinion of the court, said: "The resolution "of the Grand Lodge was but a proposition made to the "Masonic Hall Association, and when accepted the reso- "lution and acceptance constituted, at most, only *an ex-* "*ecutory contract inter partes.* It was a contract *made for* "*the benefit of the association*, and of the Grand Lodge; made "that the latter might acquire stock of the former, and "that the former might obtain relief from its liabilities. "The holders of the bonds were not parties to it, and "there was no privity between them and the lodge. They "may have had an indirect interest in the performance of "the undertakings by the parties, as they would have in "an agreement by which the lodge should undertake to "lend money to the association, or a contract to buy its

"stock to enable it to pay its debts. The general rule is "that privity of contract must exist between the party "suing and the party sued in order to the maintenance of "an action of assumpsit. There are many exceptions to "it. One is where under a contract, between two persons, "assets have come to the hands of the promissor or under "his control which, in equity, belong to a third person. "In this case the third person may sue in his own name, "but then the suit is founded on the implied undertaking "the law raises from the possession of the assets, rather "than on the express promise. Another exception is "where the third person is the beneficiary solely interested "in the promise, as where one contracts with another to "pay money or deliver some valuable thing to a third "person. But where a debt already exists from one person "to another, a promise by a third person to pay such debt "being primarily for the benefit of such original debtor, "and to relieve him from liability to pay it (there being "no novation), he has a right of action against the prom-"issor for his own indemnity, and if the original creditor "can also sue, the promissor would be liable to two sepa-"rate actions, and therefore the rule is that the original "creditor cannot sue." pp. 123, 124.

The causes were heard and determined in the court below by the Hon. S. L. Withey, who, after most exhaustive arguments and a careful consideration, held:

"The lien upon the property of the company was effected by virtue of the statute upon the issue of the bonds by the State and their acceptance by the company. Unless an intention of the State Legislature to secure the purchaser of the bonds can be implied from the act and deal-

ing of the parties, the claim of complainants to the relief asked in these suits rests upon a mere equity. There is no denial that it was the State of Tennessee which was invested with the lien, but it is said that she occupies the position of a surety, holding securities for the payment of the debt, which security the creditor — the bondholder — can, upon default of the principal debtor — the railroad company — avail himself in equity; that default by the company and by the State in the payment of the interest having occurred, the State becomes and is a trustee of this lien for the benefit of the bondholder. It was the State and the railroad company that dealt together in this matter. The State dictated the terms upon which it would grant aid, and the company accepted those terms without reference to what the purchaser of the bonds would say or claim. The bonds were loaned by the State and passed over to the company, to be sold for money to aid or accommodate the company. The bonds were accepted by the company, upon the understanding and agreement, 1st, that the State was invested with a lien upon the company's railroad and property to secure the payment by said company of said bonds, with the interest thereon as the same became due. 2nd. That the interest should be paid by the company to the financial agent of the State at least fifteen days before it should become due, or satisfactory evidence be produced that it had been paid or provided for; and, 3rd, that the principal of the bonds should be paid by the company by means of a sinking fund in the State treasury, created by the purchase and deposit therein of Tennessee interest bearing bonds, supposed to be adequate for the purpose of enabling the State to meet its bond at maturity. * * *

"There is nothing in any of these stipulations out of which the relation of the State to the bondholder is changed from that of a principal debtor to a surety. Nor does it appear how the company becomes debtor to the bondholder in any degree whatever. There is no express promise on its part to the bondholder, nor is any contract relation implied between him and the company. Sec. 3 contains no language importing such promise. It declares merely that the State of Tennessee shall be invested with a lien for the payment of the bonds by the company. The State imposes the lien if its aid is accepted, and as a condition of the grant. The language may imply a promise by the company accepting the aid to pay the State, but there is no obligation of the company to pay the bondholder, resulting either from positive law, or from contract expressed or implied," and he dismissed the bill.

See opinion, Record 324 to 334.

The same ruling was made in some of these causes now pending in this court, on appeal by the Hon. E. S. Hammond, District Judge for Western District of Tennessee; and such also was the decision of the Hon. C. F. Trigg, District Judge for the United States District Courts of Tennessee, in case of Merian v. Mobile & Ohio R. R. Co.

Tompkins v. Little Rock and Ft. Smith Ry., 18 Federal Reporter 344, decided in 1883, in Eastern District of Arkansas, Mr. Justice Miller presiding,

Was a case very similar to the case at bar, and was brought upon bonds of the State of Arkansas, payable to the Little Rock and Ft. Smith Railroad *or bearer*. They were pure State bonds, and were sold without endorsement or obligation on the part of the railroad company, to whom

they were issued. The State defaulted on payment of interest and demand was made of the railroad company, which was refused, and this suit was brought in equity to enforce the lien or security held or taken at time of the delivery of the bonds by the State for its protection and indemnity. The security the State held was the following provision in the act granting the aid or loan of the bonds:

Section 7. "Be it further enacted, That the Legislature shall, from time to time, impose upon each railroad company, to which bonds shall have been issued, a tax equal to the amount of the annual interest upon such bonds then outstanding and unpaid, which tax may be paid in money or in the past due coupons of the State at par, and after the expiration of five years from the completion of said road the Legislature shall impose an additional special tax of two and a half per cent. per annum upon the whole amount of the State aid granted to such company, payable in money, or in bonds and coupons of the State at par, and, if in money, the same shall be invested by the Treasurer of the State in the bonds of the State at their current market value. The taxation in this section provided to continue until the amount of the bonds issued to such company, with interest thereon, shall have been paid by said company as herein specified, in which case the said road shall be entitled to a discharge from all claims or liens on the part of the State; provided, that nothing herein contained shall be so construed as to deprive any company securing a loan of the bonds of the State, herein provided for, from paying the whole amount due from such company to the State at any time in the bonds of the State loaned in aid of railroads or the coupons thereon, or in money."

Section 8. "*Be it further enacted*, That in case said company shall fail to pay the taxes imposed by the preceding section at the time the same becomes due, and for sixty days thereafter, it shall be the duty of the treasurer of the State, by writ of sequestration, to seize and take possession of the income and resources of said company until the amount of said default shall be fully paid up and satisfied with cost of sequestration. After which said treasurer shall release the further revenues of said company to its proper officers."

Mr. Miller, Justice, in disposing of the case, on page 348, says:

"The proposition of complainants is, that these sections "are in the nature of a statutory lien on the property of "the railroad companies which received the bonds for the "security of the payment of these bonds, and that this "lien enures to the benefit of any bondholder into whose "hands they may come. This proposition naturally divides "itself into two questions, namely: 1st. Does the statute "create a lien in favor of the State? 2d. If it does, is it "a lien which follows the bonds of the State into the "hands of the subsequent holders after they have been "delivered to the holders?"

* * * * * * *

And on page 355 the same Judge effectually disposed of the principle involved in this case. He says:

"That the right of the State to levy a tax on the rail-"road companies, was, in the language just quoted, 'not "intended to create a trust in favor of the bondholders,' "is manifest from the provision, that the companies could "discharge themselves from all liabilities by payment of "the amount of the State bonds into the State treasury at

"any time it suited their convenience, without regard to "the time the bonds fell due or to the rate of interest they "bore. It is important to observe, also, that this could be "done by making payment in any of the railroad bonds of "the State, so that one of these defaulting companies, by "paying at a discount bonds of the State issued to other "companies, could discharge themselves of the lien which "it is now asserted exists as security for the bonds which "they had received and issued without redeeming a single "one of their bonds, or paying a dollar in satisfaction of "their principal or interest. *These bondholders, in such an "event, would be left where they are now, with their sole reli-"ance on the faith and credit of the State, which, in my opin-"ion, is all they ever had or bargained for when they took the "bonds, and which is all the statute or the nature of the trans-"action was intended to give them.*"

This case clearly distinguishes the case of Railroad Company v. Schutte, 103 U. S. 118, from the one at bar, showing conclusively that, in that case, the railroad company gave a mortgage to secure the State bond in whosoever hands it came, and it reiterates the principles of the Chamberlain case, 92 U. S. 299, as the correct principle governing such cases as the one under consideration.

It would seem that further argument or citation of authority was a useless consumption of time, but the magnitude of the interest involved and the zeal and ability of opposite counsel, will not justify any relaxation on our part in bringing to the attention of the court every consideration that can induce a favorable opinion, as the railroad companies represented by us have paid in full their obligation to the State by the return of every dollar ever borrowed.

Now what are the rules and principles to be extracted from these cases? They are:

First—That the seller of a State or other municipal bond, payable to bearer, does not, by such sale, incur any contract liability, other than that of one who passes a bank note; he incurs no liability, ex-contractu, other than the implied contracts that he owned the paper when he sold it, and that it is not a forgery; he incurs no obligation to pay the holder of the bond either principal or interest.

Secondly—That no contract relation or privity of contract exists between a railroad company and the subsequent holder of State bonds payable to bearer, by reason of said company's having borrowed those bonds from the State, and sold them in market. And as an inevitable consequence flowing from this principle, in such a case, any lien created by statute or other contract in favor of the State, though expressed to be *to secure the payment of said bonds*, only enures as matter of contract to, and for the benefit of the State solely, and creates no lien or contract on the company in favor of the holders of the bond, *but* is a lien and contract which the State as sole owner and beneficiary may part with at pleasure.

The relations of the parties under the act of February 11, 1852, and amendments thereto, are precisely within the principle just laid down. The bonds issued were the bonds of the State, on which she was primary and sole obligor. The company borrowed these bonds and sold them.

By borrowing them she became the debtor of the State for the amount of the bonds borrowed, but incurred no liability, ex-contractu, to the bondholder, by selling them. And as no contract relation existed between the bondhold-

er and the railroad company, the reservation by the State of the statutory lien in her favor, and vested in her, though expressed to be, *to secure the payment of said bonds*, created no specific lien in favor of the bondholder, and is a contract in which he has no legal interest or contract right.

If this proposition be sustained by the court it is an end of the case. But we pass to another.

And we now propose to show that the subsequent sections and clauses of this act clearly demonstrate the sense in which the Legislature employed the phrases, "*the bonds* "*shall constitute a lien*," and also, "for the payment of said "bonds and *interest as it accrues*." And that the true sense of these clauses is that a lien was created for the sole benefit of the State, and the company required and obligated to pay the State as the sole creditor.

5 Cranch R., p. 1. A. D. 18 . Opinion by Marshall, Ch. J. Alexander v. Mayor.

"If in a subsequent clause of the same act provisions "are introduced which show the sense in which the Legis- "lature employed doubtful phrases, previously used, that "sense is to be adopted in construing those phrases."

Potter's Dwarris on Statutes, p. 191; note 1.

With this rule in view, let us examine the fourth section of the act. It provides for the issuance of the like amount of bonds (as those issued on the first section of the road), on the like preparation of each additional section of the road, and further declares, "and upon the issuance of the "said bonds the State of Tennessee shall be invested with "a like lien or mortgage upon the property, for the pay- "ment of said bonds and interest accruing thereon. And

"when the whole of said road shall be completed *the State* "*shall be invested with a lien upon the entire property for the* "*payment of all of said bonds issued to the company as pro-* "*vided in this act.*" This section then declares it unlawful for the company, after the bonds have been issued, to create any lien, to come in conflict with or have priority *over the lien of the State*, and such lien is declared to be null as against *the lien of the State*, and *the lien of the State* is declared prior to all others. Here is exhibited a most vigilant, cautious and painstaking care to fasten this lien on each successive section of the road as prepared, and then on the entire road and property on completion; and this by precise and minute description of the time the lien is to take effect, the property it is to embrace, and the party for whose benefit it is created. If, by the words, "*they* (*the* "*bonds*) *shall constitute a lien*," as used in the third section of the act, and as applicable to the first section of the road, it had been intended to create a lien in favor of the bondholders, and to secure payment to them by the company, the same or equivalent terms would have been repeated in this fourth section, as applicable to the additional sections of the road, and of the entire road on completion. There is, however, a total omission in this fourth section of these words: "*They shall constitute a lien*," when declaring and fixing the lien as applicable to the additional sections as prepared, and to the whole road on completion; thus showing that it was not meant by these words to create the important and essential right of a lien and trust for the benefit of the bondholders. But *the investiture of the State with this lien upon the issuance of the bonds* is repeated in the fourth section in the clause declaring the lien on the issuance of the bonds for each successive section of the road,

and on the whole road when completed; and the terms used in both clauses are: "*And the State of Tennessee, upon* "*the issuance of said bonds, shall be invested with a lien, &c.,* "*for the payment of said bonds and interest.*"

That "*the bonds shall constitute a lien*" is only declared as to the first section of the road; but, "*that as soon as the* "*bonds are issued the State shall be invested with the lien for* "*the payment of the bonds,*" is repeated as to each additional section of the road, as completed, and then as to the entire road on the completion of the whole.

And, although, in the 1st section of the act, one of the conditions precedent to the issuance of the bonds is that no lien or incumbrance shall exist on the section of the road, or the whole road, on account of which the bonds are about to be issued, that can *conflict with the lien in favor of the State created by these acts of* 1851–2, yet, so intent was the Legislature on making the security from the company to the State certain and sure, that the following clause was inserted at the close of the 4th section: "And after the "Governor shall have issued bonds for the first section of "the road, it shall not be lawful for the company to give, "create, or convey to any person, or persons, or body cor- "porate whatever, any lien, encumbrance, or mortgage of "any kind, which shall have priority over, or come in con- "flict with *the lien of the State herein secured;* and any such "lien, encumbrance, or mortgage, shall be null and void, "as against said *lien of the State;* and *the said lien of the* "*State* shall have priority over all other claims," etc.

Seven times in the 1st, 3d and 4th sections this lien is mentioned as the "*lien in favor of the State;*" "*the State shall be invested with said lien;*" "*the State shall be invested*

with the like lien," and "*the lien of the State;*" and never once is it mentioned as the lien in favor of, or vested for, or created, or existing for, or in favor of the bondholders.

In pledging property as indemnity to a surety, or to secure a debt, the uniform practice in Tennessee has been to effectuate the purpose in one or two forms: either by a strict common law mortgage convey the property pledged to the surety to be indemnified, and to the creditor whose debt is to be secured, or to convey to some third disinterested party, as trustee, with a power of sale on default as a foreclosure in pais. The latter is the more frequent mode.

The Legislature of 1851–2 was composed in part of some of the most eminent and experienced members of the bar. M. R. Hill, one of them, was Speaker of the Senate, Jordan Stokes, another, was Speaker of the House, Francis B. Fogg, another, was Chairman of the Judiciary Committee, and Russell Houston, another, was chairman of the committee that prepared this act.

These gentlemen were thoroughly cognizant of and familiar with the modes of pledging property in Tennessee, and it is unreasonable to suppose that if they intended to impose an obligation on the railroad companies, or create a lien on their property in favor of the bondholder, they would have done so in the form presented in this statute.

Had they intended to create a lien in favor of the bondholder, and put it in a trustee, whether they intended to make such lien jointly for the benefit of the State and bondholder, or solely for the bondholder, they would have had the property conveyed to the trustee by its legal title, with power of taking possession and power of sale on

default; and this trustee would have been some disinterested third person subject to the jurisdiction of the courts, and amenable to its process; they would have given the bond a form that would have made the company a party obligor thereto, and expressed clearly the beneficial interest of the bondholder in the lien. They would not have vested the proposed lien in the State, the primary and sole obligor on the bond, and a party not subject to the process of the courts and not amenable to its process; nor would they have described it as the lien in favor of the State, and the lien of the State, and the lien vested in the State; nor would they have left the beneficial interest of the bondholder to implication or inference.

But, in the statute before us, it is not the property nor its title that is pledged or conveyed to the State as trustee, but *it is the lien that is vested in the State.*

Again, this lien, by the express terms of the statute, is to vest in the State as soon as the bonds are issued to the company, and before they are sold to third persons.

Thus our adversaries would have the mortgagor the holder of the obligations secured by his own mortgage, and the primary obligor on the bond the trustee to enforce the mortgage, and this trustee not subject to judicial control.

The 5th section of the act, in all its provisions, evidences that the legislative intent was that the State, as primary and sole debtor of the bondholder, should pay to the bondholder his interest as it fell due; but that the payments of the interest due from the company to the State should be made by the company to the State fifteen days before the corresponding interest coupon matured from the State to the State's creditor, the bondholders.

By the 1st section of the act, *it is provided* that the Governor should issue the coupons of the State, not those of the company; and coupons expressing an obligation to pay the interest to the bearer by the State alone on the 1st of January and July of each year were issued; and they were attached to bonds expressing the sole obligation of the State to pay to bearer. The only connection or relation of the company to these bonds and coupons payable to bearer was that arising as borrower of them from the State, with authority to sell them in market. Three rules of law apply here; first, the requiring and creating of an express contract, *expressly limited to the State and bearer*, must exclude any additional contract to arise by implication adding the company as an obligor; secondly, the borrowing and sale by the company of such obligations imposed no liability ex contractu on the company to the subsequent holders, except that at the date of such sale the company was the owner, and the bonds were not forgeries; thirdly, that by legal operation and effect, the borrowing of the bonds by the company from the State created a debt from the company to the State corresponding in amount and rate of interest with the bonds of the State so borrowed; and as the bond and coupons, as prescribed by the act, contain and express no obligation of the company to pay to the holder of the bonds and coupons, the company's liability remains to the State.

But, of course, as this obligation of the State to the bondholder was assumed by the State for the accommodation of the company, it was eminently proper and just that the payments by the company of its liabilities to the State should be so regulated, in point of time, amounts, and mode of payments, as to furnish the State with timely and

ample supplies of means to enable it to meet its own liabilities incurred for the accommodation of the company; and this arrangement of convenience between the company and State could have no possible legal effect to impose any direct obligation from the company to the bondholder of the State. And it would be violative of the natural and usual mode of transacting business to intend to make the company, either primarily or secondarily, liable on the bonds or coupons, as maker, guarantor, endorser, or surety, and yet wholly omit its name or any express connection of it from the bonds and coupons, and make them payable to bearer, and executed alone by the State.

The provisions of this 5th section are in harmony with the rights and liabilities of the parties as given above, requiring the company to pay to the State the interest due from it to the State on its debt for the amount of the loan, and so arranged in point of time as to antecede the maturity of the State's obligation on the coupons to the holders thereof.

The requirement of the 5th section is: "That the com-"pany shall deposit in the Bank of Tennessee, at Nash-"ville, at least fifteen days before the interest coupons fall "due, from time to time, an amount sufficient to pay such "interest, or satisfactory evidence that said interest has "been paid or provided for."

Several manifest and convincing reasons obviously appear in the terms of this section showing the word "deposit" to have been used as meaning "absolute pay-"ment." The Bank of Tennessee belonged wholly to the State, and was its fiscal agent, wherein were kept all the moneys of the State from whatever source derived, and

from it they were distributed. It was the treasury of the State. "Deposit" strictly means "to lodge in the hands "of a person for safe keeping *or other purpose.*" So it was lodged in the bank as and for a payment to the State. A deposit with a creditor of the money to pay his debt is payment; and payment to an agent is payment to the principal; and this section requires this payment to be made fifteen days before the coupons of the State fall due; and it is apparent and obvious that this was merely an arrangement of convenience between the company as her debtor and the State as creditor; it was not imagined that the terms of these provisions in the expressing of which the legislative mind was directed to the character of the arrangement between the State and company, and not to the injection of a new party, that this could be tortured into a novation by which the debt due from the company, for the bonds, to the State, would be transferred to the holder of the bonds. Had this been the intention, the obvious and simple mode would have been to make the company a party obligor to the coupon.

After the deposit of the money, as interest due the State from the company was made in the bank, no further act of the company or State was to take place to consummate the payment; no further requirement is made by the statute as to the funds so deposited as interest paid; it is left to the absolute and exclusive disposal of the State, and is placed in the treasury of the State, where no judicial process could reach or control it. The coupon is left to the operation of its own express terms, that the State, as maker and sole obligor, shall pay it to the holder, as the State's creditor, out of any funds in the treasury. It is not even made the duty of the bank or the State to use

the identical money thus deposited in the bank in payment of the identical coupons, or to use the money in payment of any coupons whatever. Nothing whatever is to be found in the law, which sets this money apart for the specific payment of interest on any bonds, any more than was the revenue deposited in the same bank by every revenue collector in the State specifically pledged and set apart to the payment of any specific class of interest. As a matter of fact the money deposited by the railroad companies was placed in the general funds of the treasury of the State and used by the State for its ordinary purposes with as much freedom as the State exercised in disbursing its revenues from any and all sources.

That the required "*deposit*" means a "*payment*," to the State by, and a full discharge of, the company consequent thereon, appears from the succeeding clause, prescribing an express equivalent, as an optionary privilege, for the mere convenience of the company, and a substitute for the "deposit." The clause referred to is: "*or satisfactory "evidence that said interest has been paid or provided for.*" This deposit is to be as *effectual as to constitute payment* as the alternative satisfactory evidence, that the interest has been paid; therefore the deposit is as completely a payment to the State as a direct payment of the interest for the State to the holder.

The very *form of the provisions*, and *the order of their succession* shows the word "*deposit*" to have been used strictly in the sense of "*payment.*" The form is, that the company is not required first to pay the interest to the bondholder, nor to deposit it subject to his order, nor as a substitute deposit it with the State, but *the primary and full duty*

required of the company is, *that it shall deposit the interest with its creditor, the State*, or, as a substitute thereof, furnish satisfactory evidence of *payment for the State* to the holder of the State's coupons, thus allowing the company the privilege or option of taking up coupons for its own convenience as a mode of paying the interest due from the company to the State; but only making it obligatory on the company to pay its interest to the State, as its absolute and primary and sole creditor. And the interest so paid by the company to the State, is not required, by any clause or section of the act, after being so deposited, to be paid to the couponholder by the Bank of Tennessee, or by the State; but it is left to the exclusive and absolute disposal of the State, with no power in the company to withdraw it, and with no declaration of its being held in trust for, or subject to the demand and control of the couponholder. That this "*deposit*" is *payment* by the company to the State appears also from the clause immediately succeeding the first clause of this section, viz.: "That forthwith" (not on default of paying the coupons at maturity), but, "on default of making the *deposit fifteen days before* the maturity of the coupons, the Governor shall place a receiver in possession of the railroad; that this receiver shall execute bond (of course to the State) shall pay over from time to time the balances of receipts over expenditures, into the treasury of the State; and the Comptroller is required to draw from the treasury at the maturity of the coupons sufficient to meet the interest on such bonds as may not have been provided for by the companies. Thus, the express provisions of the statute show, that the arrangement prescribed was one to supply the State from her debtor the funds to pay her own coupons, and this, fifteen days before

the debt became due from the State to her creditor, the couponholder. If the company do fail to pay the State, still the State is to pay the couponholder, and through its own receiver is to operate the railroad, and collect from it the amount of unpaid interest due from the company to the State, and have it paid into its treasury.

Every provision of this section corroborates the view we have taken. The company is to pay to the State fifteen days before the maturity of the State's coupon; on default, the Governor, being notified by the bank, is to put a State receiver into possession of the road to collect sufficient to pay the State the defaulted interest; the coupon is to be paid by the State at maturity of the coupon at all events; and the money collected by the receiver over expenses of running the road is to be paid to the State. The direction to the Comptroller to draw his warrant for the amount of the coupons at maturity is treated and regarded as full and certain provision for it. No remedy is given to the bondholder by a receiver; but the only one given is to the State to be operated through its own executive officers, and the proceeds are to be paid into the State treasury.

22 Wallace R. 105. A. D. 1874. Opinion of Mr. Justice Strong. Maryland v. Railroad.

This was a case of bonds of the State of Maryland lent to the Baltimore and Ohio Railroad Company.

The act contained a proviso requiring the company to secure by mortgage on its property *the payment of the interest on the sterling bonds of the State at least ninety days before the interest fell due on the coupons on the 1st of January and July of each year*, together with the cost of transmitting said interest to London to be there paid, and also exchange.

p. 107. The court held, " *This was a stipulation for indemnity. It covered all the State was required to pay*, as interest on the *sterling bonds.*"

The peculiar character of the remedy given in this fifth section and the result to be achieved by it very clearly evince the purpose of the Legislature to have been to confine the lien and obligation of the company to the State. If the company fails to pay its interest to the State fifteen days before the coupon of the State falls due, such failure is not to hinder the payment at maturity of the State's coupon, but the statute expressly provides: " The Comptroller is " authorized, and it is made his duty, *upon his warrant to* " *draw from the treasury any sum of money necessary to meet* " *the interest on such bonds as may not be provided for by the* " *company, as provided in this act*, and the Comptroller shall " report thereof to the General Assembly from time to " time."

Attentively considered, these provisions furnish a solution of the question under discussion. First, the company is to deposit the amount of interest in the State Bank due from it to the State fifteen days before the State's debt on the coupon fall due. If it fails, what is to follow? Not any protest by the bondholder and notice to the State; not any remedy by or on behalf of the bondholder; no receiver is to take possession for him, and pay the proceeds to him in liquidation of his debt; but immediately on this failure fifteen days before the coupon falls due, the State by its Governor puts its own receiver into possession, and he is to collect the defaulted interest and pay it into the treasury of the State, not to the bondholder, or where he can reach it by judicial process.

Thus the failure of the company occurs, if at all, fifteen days before the right of the bondholder is to arise; and on this failure a vigorous remedy is applied by the Governor of the appointment of a State receiver, and the fruits are to be paid to the State.

But what of the coupon? Why, the Comptroller is to pay it at maturity by his warrant on the State treasury, and report the facts to the General Assembly. This making of the company, on its failure to pay, subject to a remedy in favor of the State, and not of the bondholder; and this provision of the State to pay the coupon at maturity out of the treasury, if the company fail to pay, instead of turning the couponholder over to his remedy or any remedy against the company, demonstrates that it was not contemplated by this act to make the company liable to the bond or couponholder, nor to give the latter any remedy. Is not this special remedy so expressly and minutely set forth an exclusion of any other in favor of another party? If not, the railroad company will be subject to two inconsistent remedies by two distinct parties claiming different debts in different rights.

2 Wood C. C. R., 388. Opinion of Mr. Justice Bradley. Branch v. Macon and Brunswick R. R. Co.

Under a lien like the one before the court, holders of the State bonds claimed the lien as enuring to them. The court refused the relief, saying: "We think this cannot "be done. *The State has provided a security for its own in-* "*demnity, to be managed its own way, by its own officers and* "*agents.* Can such a security be taken out of its hands at "the instance of creditors ultimately to be benefited? "Can the State be charged as trustee for those creditors,

"and compelled to give up the trust fund, by a court "which has no jurisdiction over it? It seems to us the "difficulties of the case are insurmountable."

Murdock v. Woodson, 2 Dillon C. C. R., 206.

The court say at pp. 206–7: "I am inclined to think, "however, that the form of the transaction indicates the "intention of the parties. The State issued its bonds, and "these were negotiated and taken upon the State's faith "and credit, without any accompanying security. To in- "demnify itself the State took a lien upon the property of "the company."

A sale under this mortgage by the State, he declares, would be valid and effectual, and a contrary view would be inconsistent with the lien reserved to the State.

The first clause of the 6th section contains one of those forms of expression which are seized hold of by our adversaries, *as indicating an obligation imposed on the railroad companies to pay the bonds to the holders.* The clause is this: "*That if said company shall fail or refuse to pay any of said* "*bonds when they fall due*, it shall be the duty of the Gov- "ernor," etc.

But the same form of expression occurs, in exactly the same connection, in two cases, which the Supreme Court of the United States has construed to mean obligations of the companies to the government issuing the bonds, and not to the holders of the bonds. They are the following:

2 Otto R., 299. A. D. 1875. Opinion of Mr. Justice Field.

Chamberlain v. St. Paul & Sioux City R. R. Co.

The language there is: "If said company make default "in the payment of principal or interest, of the bonds "issued to it, the Governor shall proceed to sell," etc.

Yet, in this case the court held: "The State was pri- "marily liable on her bonds, and the company was only "liable to the State; and that the rights of the bondhold- "ers were *not legal rights arising out of any positive law or* "*agreement.*" pp. 305–7.

91 United States R., 82–85. Opinion of Mr. Justice Davis. United States v. Union Pacific R. R. Co.

The language of the 6th section of the act of Congress is: "*That said company shall pay said bonds.*" And the act contains a clause as to default of the company to pay said bonds at maturity identical in terms with the clause of our 6th section. The Supreme Court in the 91 United States R., 82–85, say: "If the language used is taken in "its natural and obvious sense, there can be no difficulty "in arriving at the meaning of the condition, '*to pay said* "*bonds at maturity.*'" * * * "*The bonds in question* "*were bonds of the United States, promising to pay to the* "*holder of them $1000 thirty years after date, and the interest* "*every six months.* THIS OBLIGATION THE GOVERNMENT WAS "REQUIRED TO PERFORM."

This plain common sense view founded on the form, nature and qualities of the bonds, and of the obligations imposed by the act on the company, as borrower from the Government of its bonds, applied to our act, and to the opening clause of our sixth section, relieves it of the distorted sense into which ingenuity would torture it, of requiring the company to pay to the bondholders at maturity their State bonds; for, in the language of the Supreme Court, "*this obligation the State was to perform.*" Hence, the obligation of the company, due to the State for the loan of its bonds, is to pay to the State, and thus to indemnify

her, and supply her with funds to meet *the bonds, her own primary and sole obligations*, created and assumed for the accommodation of the company. This convenient and just arrangement between the creditor State and debtor company, whereby the company's payment to the State antecedes the maturity of the debt of the State on her own bonds, has no effect to make the company the debtor *on the bond* to which it is not a party obligor, and whose sole obligor is the State. And to show this, see the remedy prescribed by this 6th section. It is a studied exclusion of the bondholder from a remedy made with minute caution and confined in every particular to the State. It is to be instituted *by the Attorney-General, at the request of the Governor*, not by the bondholder, or his counsel or agent; it is to be a bill in equity filed *in the name of the State, as sole complainant;* not in the name of the bondholders, nor on their behalf. If the lien had been created as a trust for the bondholders, would not this bill have been required to look to their interests? The only defendant is to be the delinquent company; the decrees and orders are to be such as may be deemed necessary for the court *to receive the payment of said bonds with the interest thereon, and to indemnify the State against loss*, by putting the road in the hands of a receiver, or selling it, or *in such other manner as the court may deem best for the interest of the State.*

That the decrees and orders are to be such as may be deemed necessary for the court *to receive the payment of the bonds with the interest thereon* in a suit confined to the State as complainant, and the company as defendant, with the bondholders not parties, demonstrates that the Legislature meant the State alone to be the debtor of the bondholders, and contemplated as certain that the State would perform

her obligation and take up the bonds at maturity, and would hold them paid, when she sought to enforce her debt for their loan against her own delinquent debtor, the company. Again, the decrees are to be such as shall indemnify the State against loss, or such other as may be deemed best for the interest of the State. No mention of the bondholder or of his interest is made. The legal mind cannot fail to discover a total denial of all liability of the company to the bondholder, and of all lien on its property in trust for him, in this minute and detailed setting forth of the agents of the State, as those who are to institute the suit; of the State, as sole complainant; of the defaulting company, as sole defendant; and the painstaking appropriation of the fruits of the litigation to the State alone, with a total omission of any mention of the bondholders, and of any reference to their right. This prescribing of a peculiar remedy in favor of the State alone negatives the existence of any other in favor of the bondholders against the same party for the same debt. And if there was a doubt, it must be resolved in favor of the State, in the construction of a statutory contract involving the rights of the State and a private individual.

Charles River Bridge v. Warren Bridge. 11 Peters' R., 469, 420.

The seventh section is the section which alone points out and defines the obligation of the company to pay its debt to the State, and the time and mode of making the payments, and the thing in which the payments are to be made.

It must be kept in mind that the act, in defining the bond to be issued, requires it to be a bond, simply of the

State, payable to bearer; and so they were all framed and issued; nowhere does it require the company to become a party obligor to the bonds, and, in no section, up to the seventh, does the act directly impose on the company any obligation to pay at all; except in creating the lien in favor of, and in vesting it in the State, and in declaring it the lien secured to the State, the provisions are concluded with the expressions, *for the payment of said bonds*, meaning, as has already been demonstrated, *payment to the State* of the debt due her from the company arising from the loan of her bonds to the company; and in the sixth section, in providing the remedy of the State, the contemplated default is described as a failure *to pay any of said bonds and interest*, in the same sense of failure to pay the State. These were incidental references to payment by the company in describing *the lien* and *the remedy*, and the mind of the Legislature being intent on describing the lien in one section and the remedy in the other, would naturally merely refer to the subject of *payment* without accurately setting forth its *nature*, *mode* and *character*. But, in this seventh section, and in it alone, are the provisions, imposing the duty of payment on the company, contained and fully expressed. This is the *enacting section*, as to the obligation of the company to pay, setting forth the duty of paying, the time when, the party to whom, and the thing in which payment by the company is to be made. The company, by the first and third and fourth sections, was made *the borrower of the negotiable bonds payable to bearer* of the State, and, hence, became the debtor of the State for the amount of the loan, and this relation of debtor to the State is not transferred to the bondholder by any provision requiring the company to become a party obligor on the

bond; but it remains the debtor of the State by reason of the loan. And the payments prescribed by the seventh section are in complete harmony with the company's being the debtor alone of the State, and totally repugnant to its being the debtor of the bondholder, or being subject to any lien in favor of the bondholder.

The first clause of the seventh section is: "That at the "end of five years after the completion of said road, said "company shall set apart one percentum per annum upon "the amount of bonds issued to the company, and shall "use the same *in the purchase of bonds of the State of* "*Tennessee*, which bonds the company *shall pay into the* "*treasury* of the State, after assigning them to the Gov- "ernor. The sum of money equal to one per cent. annu- "ally on the amount of the loan is to be used in buying any "*Tennessee bonds*, and when purchased, *the bonds shall be paid* "*into the treasury of the State after assigning them to the Gov-* "*ernor.*" This is an *annual payment to the State made in its own bonds*, and for this payment the Governor is required to give to the company a receipt; and as between the State and the company, the bonds so paid in shall be a credit on the bonds issued to the company. Now, several matters appear so clearly in these provisions that they are indisputable, and do not require nor admit of construction. First, that, after five years from the completion of the road, the company shall pay to the State annually a sum equal to one per cent. on the amount of the bonds loaned to the company by the State; secondly, that this annual payment may be in any Tennessee State bonds; thirdly, that these bonds, after being assigned to the Governor, shall be paid into the treasury of the State; fourthly, that the Governor shall

give to the company a receipt for the bonds so paid in, and the bonds so paid in shall, as between the State and the company, be a credit on the bonds issued to the company.

The bonds of the State were all payable to bearer, and were solely her obligations. When, therefore, they were assigned to her Governor, and paid into her treasury, they were, as obligations, extinguished by payment, and could not be available for any purpose, except as evidence to the State of their payment; the bondholders could not reach them by any judicial process. Then this was a payment by the company to the State; and the statute expressly requires it to be receipted for, and declares it to be a credit on the debt due from the company to the State. The words, "*and the* bonds so paid in shall, as between *the* "*State and the company be a credit on the bonds issued to that* "*company,*" mean, that though such payment shall be a credit on the debt due to the State from the company, yet it shall not affect the debt due on the bonds from the State to the bondholder. It certainly must be construed as an absolute payment to the State, from the manner of making it, and the character of the thing paid. The bond is to be endorsed to the Governor, the chief executive officer of the State, and then paid into the State treasury. This effectually extinguished the bond, and put it beyond the reach of any claimant. This proposition is indisputable, when we reflect that such payments might be in any bonds of the State, and there were then outstanding three to four millions of the bonds of the State, purely State obligations, issued for her own purposes, and on which there could be no pretense of any other obligor. The Legislature knew this, and must be considered as intending to embrace such

bonds in those to be so bought and paid in to the State. Now, how could such funds be used by the State even? (The entire payments of a company might have been in such payments.) The only use possible, would be for the State voluntarily, on the payment in of such bonds, voluntarily to set apart and preserve an equal amount of the funds in her treasury, and annually six per cent. on the amount and its accumulations, as a public fund provided to meet a public liability in the future. That the words, "as between the State and the company," were not intended to annul the effect of the payment, as a payment, is evident from the fact that *the lien was vested in the State*, and a payment to the State must extinguish the lien. And, then, if we further reflect, that the company was the debtor solely of the State, the credit, so expressly declared, must be construed as extinguishing, to that extent, the debt; and the terms "credit on the bonds," must be held to mean credit on the debt of the company to the State. The act of 1852, ch. 151, is redrafted in the Code, section 1108, and the phraseology of the 7th section, ("*and as be-*"*tween the State and the company*, the bonds so paid in, "shall be a credit on the bonds issued to the company,") so modified as to omit the words, "*as between the State and* "*the company.*" This is a legislative construction of the most deliberate kind. It is, moreover, the deliberate expression of two of the most eminent lawyers of the State —Meigs and Cooper, the compilers of the Code. They saw that these words, while they could have no other effect than we now give them, were subject to mislead in the very way they misled our adversaries.

To ascertain the true construction of this section, regard must be had to the true contract relation of debtor and

creditor existing under the statute, and by virtue of the loan of the bonds, between the company and the State, and that the company is not a party to the bond at all, and the State is the sole obligor on the bond, and is invested with the lien for the payment of the bonds, by the company; then consider what the company is to do and its effect; then what the State is to do and its effect. The company is to make the annual payment to the State by buying up any State bonds, assigning them to the Governor, and paying them into the State treasury. *The bonds so paid in are to go as a credit to the company against the State.* The nature of the thing paid in negatives any interest in, or benefit to third persons; for the bonds of the State, assigned to her Governor, and paid into her treasury, are unavailable to any creditor of hers, but they are the best possible security and payment to her. It is not conceivable that such a security would be provided if the bondholders were the objects of solicitude or were to be protected by the security. The prescribed use practically extinguishes the security provided, for to assign one's own debt to him and then deliver it to him is to extinguish it as an available liability.

The payment is expressly declared to operate as a credit between the State and the company, but the State is the sole creditor of the company, and is alone invested with the lien; the payment must therefore satisfy the debt and extinguish the lien.

This again negatives that the bondholder has any legal right or trust in the lien. The clause, "it shall be a credit as between the company and the State on the bonds issued to that company," simply means that it shall not be a

credit on the bonds as against the holders and in favor of the State, because the bonds being, at the time, out in the hands of holders, such payment could not be a credit on them. And really this clause reflects a strong light on the expressions "*for the payment of said bonds*," used in the 3d and 4th sections at the end of the sentences creating and vesting the lien in the State; it shows that it meant payment to the State, for here on a payment being made, as required by the statute, it is expressly provided that such payment shall be a credit, as between the State and the company, on the bonds issued to the company. Thus showing that the expression, "*for the payment of said bonds*," meant payment to the State.

Again, the State is to take the bonds so paid in, and use them and the interest accruing thereon, from time to time, as a sinking fund for the payment of said bonds. This is clearly a provision whereby the State seeks for its own benefit to accumulate and provide itself with a fund to meet its own bonds at maturity. Its own bonds in its treasury could not be used to accumulate a fund except by its own voluntary act, and the fact that such a scheme was prescribed shows unmistakably that it was intended as a voluntary measure of the State to supply itself with funds. No judicial power or process could reach or enforce it.

The scheme, however, excluded and negatived completely any idea of trust for or benefit to the bondholder, as matter of contract, or legal right founded in positive law or agreement.

A calculation of the one per cent. sinking fund will show that before the maturity of the bonds it would liquidate the whole debt due from the company to the State, in

respect of the principal of the bonds, and leave the State bound to pay the bonds to the holders purely as it own debt, without any right to call on the company for any further reimbursement; and yet to hold the lien, one in favor of the bondholders, would be to make the company's property liable after it had fully paid the debt under the contract.

The last clause of the seventh section provides, in case of default by the company in raising the sinking fund, the same remedy, by receiver, appointed by the Governor (as in the fifth section, on default in payment of interest,) still confining the remedy to the State.

If, as was contemplated by seventh section, every company annually made its payments in any of the bonds of the State, they would all extinguish their liabilities to the State before the maturity of the bonds loaned to them. Thus the State would be equally relieved as if each company had paid in the identical bonds issued to it and the company would have discharged its debt with an exact equivalent. In the meantime, all the State bonds would be kept up to the same standard of credit, and the railroad companies, while fulfilling their contracts to the letter, could do so with the greater facility and more certainty than if required to pay in the identical bonds issued to them.

Let us follow the practical workings of the 7th section a little farther, and see if it does not solve the whole proposition as to what is the proper construction of these acts.

Suppose the company should pay in promptly the interest on these bonds in cash to the treasurer of the State, and

should pay in the entire loan made to it in other State bonds than those issued to it, this 7th section expressly provides that "as between the State and said company "the bonds shall be a credit on the bonds issued to the "company." If the entire amount be paid, then it will be an extinguishment of the entire debt. Now, at the expiration of five years from the completion of the road, the company might pay in the whole loan, and, of course, as the lien is alone for the State, this payment would operate as an extinguishment of the debt and an entire release of the lien, and this by the plain reading of the act. To see how absurd complainants' theory is, suppose the money thus paid into the State treasury is never paid to the bond or couponholder by the State, is it any less an extinguishment of the lien? Does the debt still remain between the railroad company thus paying and the coupon holder? No such idea can be gathered from the act, but the reverse is its plain reading. The moment the railroad company pays to the State the amount so loaned on any of its bonds, not the particular one loaned to it, but any State bonds, this 7th section provides that it shall operate as a satisfaction of the debt due to the State, although the State may never pay the holder of the particular bonds issued to the railroad company thus paying, and this upon the idea that the only debtor, the holder of the bond has, is the State, and to it alone he looks for payment. This 7th section carries out this idea and provides that if the identical bonds so loaned are paid in, this shall be at once cancelled, but if other bonds are paid in, they shall be held by the State to meet the particular bonds outstanding and due by it.

It then results that the railroad company may pay in to

the State its entire debt, and if the State fails to pay the bondholder, then, according to the complainants' theory, the properties of the railroad company can be subjected to its payment a second time, and this in the face of the act which expressly provides that a payment in any State bonds discharges the debt. These views are entirely repugnant to the letter and spirit of the contract, and clearly demonstrate our construction of the act as the only one consistent with the objects contemplated by the contracting parties at the time, for the question as to whether the State would pay its bonds was not considered or within the contemplation of the parties. Its bonds were then above par, and the only solicitude was to loan to corporations that would be able to return the loan, and to secure the State at all events. Why should the State, the lender, be so solicitous about the bondholder's security? In the light of those days, and we insist the statute must be interpreted as matters then existed, the default of the State in meeting its obligation was not even contemplated, and as the road was to be built and the loan made to the railroad company, and the contract was entirely between them, no bondholder being a party thereto, it is difficult to perceive how any such theory as complainant advances can be seriously considered.

Withey, J., in delivering the opinion in this cause thus treats this same question:

"There is nothing in the act to indicate that after the company had complied with these provisions as to the interest and sinking fund, and has thus provided the State with the means of payment, that the company was also required to pay to the bondholders. Certainly this was

not the condition of the security, as the only way in which a default could occur was by failure of the company to provide for payment of the interest and principal in those specified ways."

See opinion. Record, p. 330.

And finally, such a scheme is utterly repugnant to and irreconcilable with any lien on the property of the company, or obligation by the company in favor of the holders of the identical bonds issued to such company; for the former is based on the right of the company to pay in any State bonds, and the latter is based on the right of the bondholder to have his bonds paid by the company to whom they were issued.

The former is in harmony with facts and circumstances as they existed when the act was passed, and viewed in the light the Legislature saw them in; when the credit of the State was unquestioned, and above par, and her bonds needed no support of a lien, but were better without them; and when the railroads were all unfinished adventures, without means and without value or credit.

The latter is possibly in harmony with what subsequent events would make it better for the State bondholders, if their ingenious and distorted theory had been the scheme of the act.

But we repeat here the rule and warning of the Supreme Court in 9 Otto R., pp. 63, 64: "*There is always a tendency* "*to construe statutes in the light in which they appear when the* "*construction is given.* It is easy to be wise after we see "the results of experience. *In endeavoring to ascertain* "*what the Legislature meant, we must, as far as possible, place*

"*ourselves in the light that the Legislature enjoyed, look at* "*things as they appeared to it, and discover its purpose from* "*the language used in connection with the attending circum-* "*stances.*"

The twelfth section is a declaration, contained in the act, that the lien created was not a trust for the benefit of the bondholders, and that the obligation of the company was solely to the State. For the reservation is of a right to deal with the property of the company in future as the Legislature of the State may deem best to protect the interest of the State and secure her against loss in consequence of the issuance of the bonds.

The reservation of an unlimited power to deal with a subject matter, or property, is the assertion of an absolute control and power of disposal, and the denial of the existence of any conflicting right or interest.

The last clause: "But in such manner as not to impair "the vested rights of stockholders, of the companies," saves only the rights of stockholders, and is itself a denial of the existence of any other conflicting rights.

This section manifests a clear intention to hold the full power in the hands of the State to protect its own interests, and throws additional light on the nature of the lien reserved, as one absolute in the State.

The express purpose to be attained by this future legislation is, "*to protect the interests of the State*, and to secure the State "*against any loss.*" * * Nowhere are the interests of bondholders mentioned; *no protection, no security to them is provided.*

And this future legislation is restricted to be, "*in such manner as not to impair the vested rights of stockholders.*" The holders of State bonds are again omitted to be noticed. This is wholly incompatible with the position that the Legislature had in contemplation, a lien and security for them, a mortgage, a perfect legal right secured by contract.

No doubt can exist but that the whole interest of the State in the debt, created by loans to railroads, in the statutory mortgage constituted for the security and payment of that debt, as well as the best way and means to protect and indemnify the State against loss on account thereof, are, by the broad and comprehensive language of the reservation clause, placed in the hands of the Legislature, to be managed and controlled as its members may deem necessary and most conducive to the public good and welfare. It would seem to be equally clear that no other person or class of persons, excepting stockholders, could acquire any right of property by sale or contract under the act, which would not be subject to the power and discretion of the Legislature. The familiar maxim, "*expressio unius est exclusio alterius,*" applies with more force in the interpretation of statutes than in the construction of deeds and other written instruments. It was never more applicable than when applied to the section in question. The expression that the vested rights of the stockholders shall not be impaired by the exercise of the power and discretion reserved to the Legislature, excludes by necessary implication all other exceptions and exemptions; and, as a matter of course, the rights of bondholders do not belong to the single exception and exemption of stockholders, but fall under the other provisions of the section which do not impose any limitation or restriction, excepting that of the

interest of the State and its security against loss in consequence of the issuance of the bonds. This power and discretion of the Legislature is as absolute and as effective in its exercise over everything within the scope and sphere of the reservation, as it is in cases of a general power, to amend, alter or repeal over all the parts of a charter.

The 13th section of this act further shows, that the lien is intended alone for the benefit of the State. It provides, that when the Governor shall reliably learn that any one of said railroad companies has obtained the State bonds by fraud, or contrary to the provisions of that act, he shall notify the Attorney-General, who shall forthwith sue, *in the name of the State*, the company; and on satisfactory proof of the allegations of the bill, the court shall decree the sale of the road and property, and the proceeds shall be paid into the treasury of the State; and the Comptroller shall immediately vest the same in stocks, creating a sinking fund, as provided in the 7th section. And the stockholders thereof shall be individually liable for the payment of the bonds so fraudulently obtained, and for all other losses that may fall upon the State, etc. Now, here, upon a fraudulent obtaining of the bonds from the State, a suit, *in the name of the State*, is to be immediately brought *against the company and its stockholders*, alleging this *fraud;* and if proved, the court is to decree a sale of the road, and the proceeds to be paid into the treasury, to be used as a sinking fund, to meet the debt of the State. The bondholders are not required to be made parties; the suit is to be instituted before the bonds or coupons are due; and the road is to be sold, and proceeds paid into the treasury of the State. Negative implication, excluding totally all idea of the bondholders' interest, could not be stronger.

The grounds of the suit are to be: that the bonds were fraudulently obtained by the company from the State; with this the holders could not be affected; the suit is to be by the State, as plaintiff, against the company, as defendant. The bondholders are not to be parties. The road and all its property is to be sold and the proceeds to be paid into the treasury of the State to provide a sinking fund to meet its own debts, not the bonds issued to this company, and all this before a bond or coupon is due. Where is the remedy of a bondholder to take money out of the State treasury? Where is there any provision for their benefit in any of these acts? What court or suitor can control the Comptroller of the State in his dealings with the funds of the State in its treasury? The railroad company owed no debts to the holders of the bonds, its name was not upon any of the bonds issued by the State. No action against the company could be maintained by the bondholder arising ex-contractu, and the statute prescribes the suit, the parties and the measure of relief, wholly omitting the bondholder.

The thirteenth section in declaring the liability of the stockholders for the fraudulent acts of their company in obtaining the issuance of the bonds of the State, clearly shows that the words, "*payment of said bonds,*" are used in this act in the sense of payment to the State of the amount called for on the face of the bond. The language is: "And the stockholders thereof shall be individually liable "for the payment of the bonds so fraudulently obtained by "such company, and for all other losses that may fall upon "the State, in consequence of the commission of any other "fraud by such company."

The words of the second member of this sentence, to-wit: "*and for all other losses that may fall upon the State*," clearly imply that the first member referred to "*losses on "the State*," else why say "*and for all other losses that may "fall on the State?*" It is as if the provision were, "shall "be individually liable for the payment of the bonds so "fraudulently obtained," *as a loss upon the State and for all other losses.*

But this is evident on other considerations. The obtaining of the bonds *fraudulently* would not be a fraud on the purchasers of them, nor would it affect their title and right to collect the full face value of them, nor diminish the State's liability to pay them in full, to a bona fide purchaser in due course of trade. There would be no fraud on the holder, and consequently no right of action in him against the company or stockholders who perpetrated the fraud on the State. But the same facts would constitute the fraud upon, and pecuniary injury to the State, and she would have a right of action based on this fraud and injury. It is this liability the statute gives to the State a right of action for in the language quoted against the stockholders. It would rise immediately on the perpetration of the fraud to be enforced then, although the bonds themselves were outstanding and had thirty to forty years to mature. The clause of the 13th section just discussed thus demonstrates that "*for the payment of the bonds*," whenever used in this act in reference to the company, were used as meaning the debt of the company to the State for the amount of the bonds lent to such company.

The 14th section in providing for the appointment of an agent for the State to attend the foreclosure sales of the

roads under this act and buy them in for the State, and providing no means to meet such purchases, clearly indicates that the Legislature contemplated sales to be made to pay the indebtedness of the companies to the State, thus again asserting the obligation of the company to be solely owing to the State, and the lien to be solely in favor, and for the benefit of the State.

The right of action given by the 13th section against the stockholders is of course one subject to the ordinary rules of laches, and staleness of demand, and statute of limitations, and it could not therefore be intended to postpone it until the bonds fell due thirty to forty years after their issuance. This presents another consideration tending to show that the right of action was one given to the State to be promptly enforced; and, therefore, shows that the words, "for the payment of the bonds," is used in this act to mean payment to the State of the amount of the bonds.

As further evidence that the act of February 11, 1852, ch. 151, did not mean to give a lien on the property of the company to and in favor of the holders of the bonds issued to such company, we call attention to the fact that the act did not require the company to sign the bonds, or to endorse them, or to put any marks, indicia or designations on the bonds whereby to call the attention of the purchaser, or fix the bond as one delivered to any particular company. This act did not even require the bonds to be numbered; nor did it, or any other act, require the act under which the bonds were issued to be printed on it, or expressed in its face. So, under the provisions of the act the bonds would be executed, and issued, and sold as

straight State bonds without any indicia whatever on them, giving notice to the purchaser that they had been issued to any railroad company whatever. The numbering prescribed and required by the act of February 25, 1852, is not one peculiar to any railroad, nor such as to designate to what company issued; it was that required as to all bonds of the State for whatever purpose issued. The bonds issued to each railroad company were not required to be, and were not numbered in distinct series, so as to distinguish the bonds issued to one railroad company from another, nor so as to distinguish them from bonds issued for other than railroad purposes, but all were numbered in the same general series. Neither were the railroad companies required to preserve the numbers of the bonds issued to them, nor did they do so. The system was the general law, and the same that had been applied to all State bonds for whatever purpose issued. The numbering of the bonds issued to any railroad, or for any purpose, begun at the number last issued for any purpose. It is the same system adopted by banks and other institutions in issuing notes for circulation and bonds; and its purpose is to guard against an over-issue and counterfeits. No record was required to be made of the receipt, and no provision that this receipt should go on any book of account. And the receipt was to be kept, not by the fiscal officer, the Comptroller of the Treasury, but by the Secretary of State.

This act of February 21, 1852, ch. 153, does not, therefore, provide for any record of any numbers of the bonds in his office, who was to act in the matter of seeing the bonds and interest paid, but in another department, that of State, as distinguished from the department of the

treasury; and the former had no connection with the financial operations by means of which the bonds and interest would be paid. The act is therefore wholly without significance in this view. The entries on the books of the defendant company do not show the bonds issued to this company, not even by their numbers.

If, at the time of receiving these bonds, the companies had understood that they were to pay respectively the principal and interest of those issued to them, the first object of solicitude would have been to keep and have accessible to their fiscal officers the means of identifying the bonds and coupons they were each to pay. The nonexistence of such evidence is plenary proof that the companies did not regard themselves as so bound, and construed the act as we now insist.

It is true, the bonds were, by the act, to be made payable in such place in the United States as the President of the railroad company to whom they were issued might designate. The purpose of this was to enable him to meet the views of purchasers as to place of payment; and as the company was required to pay all exchange and expenses, so as to completely indemnify the State, it was just to let the President fix the place of payment. It was not thereby intended to fix on the company the liability to pay the coupon; for had that been the purpose, the simple, natural and business-like way of accomplishing it would have been to make the coupon the obligation of the company *as maker*, with the State as guarantor. The mode of payment prescribed by the statute, both as to interest and principal, is just such as was proper and fit to secure to the State prompt and timely payment to her by the com-

pany, so as to enable the State to meet at maturity its own bonds and coupons created for the accommodation and benefit of the companies, and to afford the State complete indemnity. But the very form, nature, qualities and character of the obligation prescribed by the express terms of statute (bonds and coupons made by the State, as primary and sole obligor, containing no obligation or reference to the company), exclude totally the construction that it was intended to make the companies obligors on the bonds or to create a lien on their property in favor of the holders. Such a construction is directly in the teeth of the express terms of the obligations themselves as created by the act, and made as required by the enacting section.

Having established by this analysis and review of the statute, as we insist, that no contract relation exists between the company, as debtor, and the State bondholder, as creditor; that the company is the debtor only of the State; that the statutory lien on the property of the company was created for the sole benefit of the State, and only to indemnify it; we insist, the State had the right, by and with the consent of the company, to dispose of the lien by assignment for value; and the bondholder has no right to, or interest in it, and can set up no valid objection to such assignment.

To establish these propositions we present the following authorities:

2 Otto R., 299. A. D. 1875. Opinion by Mr. Justice Field. Chamberlain v. St. Paul and Sioux City R. R. Co.

We give the facts and history of this case because of its striking similarity to the one before the court, and because we regard it as decisive of it. It decides that a mortgage

by the company (much stronger than ours in favor of the bondholders of the State of Minnesota,) was not intended to create a trust in favor of the holders of the State bonds; that the State was primarily liable to the holders of her own bonds; and it was only as between her and the company that the relation of principal and surety existed; that the bondholders had no legal right arising out of the contract or any positive law, and no lien which attached to and followed the property.

Mr. Justice Field announces the position of the complainant to be: "That notwithstanding the form of the "contract the *original company was, in fact, the principal* "*debtor*, and *the State its surety*, and that *as the creditor to be* "*paid*, he is entitled to have the securities taken by the "State applied to the payment of the bonds held by him; "that 120 sections became the property of the original "company, by the act of May 22, 1857; that the interest of "the State therein under the trust deed was only the right "to hold them as security against loss upon its bonds; "that the foreclosure could not and did not change it, and "the defendant company held with notice that the State so "held them." p. 305.

But the court held: "The deed and mortgage to the "State were not intended to create a trust in favor of the "holders of the State bonds." "The State was primarily "liable to the holders of her own bonds; and it was only "as between her and the company that the relation of "principal and surety existed." "It may be doubted "whether the bondholders could call on the company in "any event. The endorsement made by the President "simply transferred the bonds, it was not the act of the

"company." "Whatever right the plaintiff had to compel "the application of the lands to the payment of his bonds "was only in equity. It was not a legal right arising out "of any positive law or agreement of the parties. It did "not create any lien which attached to and followed the "property. It was a right to be enforced, if at all, only "by a court of chancery against the surety. But the State "being the surety it could not be enforced at all, and not "being a specific lien cannot be enforced against the State's "grantees."

A careful analysis of this decision will throw a great deal of light on the case we propose to discuss.

In this Chamberlain case, the court held, first, "*that the "State was* PRIMARILY LIABLE *on her bonds, and only as "between her and the company did the relation of principal "and surety exist.*" The meaning of this proposition is that no privity of contract existed between the holders of the State bonds and the railroad companies to whom the bonds of the State had been issued. This is clearly so, for the holding of the court was in reply to the proposition of the complainant's counsel, "*that the original Southern Minnesota Railroad Company was the principal debtor, and the State only surety.*"

Obviously the court held as above stated, because the State bonds only contained the express "*promise to pay*" of the State, for the payment of the interest and principal; her faith and credit alone were pledged; the President's endorsement was only a mode of transfer, it was not the endorsement of the company. The bonds were the *express obligation* of the State, with no *obligation of the company expressed on*, or *contained in them.*

The court next declared, "that the only right the plaintiff had to compel the application of the lands received by the State, to the payment of the bonds held by him, was "*one resting in equity only. It was not a legal right arising* "*out of any positive law, or any agreement of the parties.*"

Now let us attend to, and consider the features of this contract, as prescribed by the amendment to the constitution of the State of Minnesota of 1858, and as made by the State and railroad company, that led the court to declare, that these securities given by the company to the State, by this contract were given solely for the protection of the State, and did not create a specific lien and trust in favor of the bondholder. The court does not state these features, but seems to regard them as so palpable, that we may, without hazard or mistake, discover them, and so we may readily, from the statement of the case by Mr. Justice Field, which precedes his opinion. They are as follows:

First, *the pledge of the net profits of the road made*, as prescribed by the statute, *by a writing to secure the prompt payment of the interest on the State bonds issued to the railroad company*, WAS MADE TO THE STATE and *not to the bondholders*, nor *to a trustee for them*, and no stipulation to apply them to the bondholders' benefit.

Secondly, the 240 sections of land were conveyed, *not to the bondholders nor to a trustee for them*, BUT DIRECTLY TO THE STATE, and no stipulation to devote them to the bondholders' use.

Thirdly, the first mortgage bonds of the company, with the mortgage to support them, *were pledged to the State, not to the bondholders.*

The interest and principal of these pledged bonds made by the company, were made payable sixty days before the maturity of the corresponding interest and principal of the State bonds. The foreclosure of these trusts and pledges on default of the company in paying the interest or principal of the bonds issued to that company, was to be enforced by the Governor, as the agent of the State, in such manner as should be prescribed by a law to be subsequently enacted, as such act was passed August 12, 1858. Thus a *remedy peculiar to the State was prescribed*, and *this remedy was to be instituted and effectuated by an officer of the State* while *no remedy was given to or for the bondholder, nor was he left to pursue the ordinary legal remedies.*

The bonds were issued in 1858, and had 10 to 25 years to run to maturity.

The remedy of foreclosure by absolute sale by the State, of the entire trust and pledged property was, under the statute and contract, to be made on any default in the payment by the company, of the interest on the State bonds. Such default might, and did occur on one of the semi-annual installments of interest which fell due years before the maturity of the bonds, and for such default the State could, and actually did foreclose by absolute sale, the trusts and pledges of the railroad company in October, 1860, and all the property, roads, lands and franchises of the company were sold, and at the sale, the State became the purchaser, as creditor. No provision was made to make the bondholders parties to this proceeding, nor to secure the proceeds of such sale to their use, and in fact the proceeds were appropriated by the State, exclusively to her own use as creditor of the company, although she left her own bonds outstanding and unpaid, both principal and interest.

46 Miss. R., 452. A. D. 1862. Simrall, J. Opinion.

A executed a deed of trust on land to trustees to secure and save harmless three named sureties in their liability incurred by signing, as joint makers with him, several promissory notes to C for the aggregate sum of $29,620. The deed of trust expressly declared its purpose to be "to "secure and save harmless the sureties and for their bene- "fit and indemnity, and it provided for the sale of the "property to reimburse any one of said sureties who "might pay any of said notes after the maturity thereof "to the payee or holder."

The sureties all formally, at the request of A, released the deed of trust without the knowledge of the payee and holder of the notes. This bill was filed by the payee and holder, asking to subject the land as provided by the deed of trust, notwithstanding the release, on the ground that the deed of trust, as matter of contract, created a lien in favor of and for the benefit of the holder of the paper, and hence the sureties and maker could not release it.

The court first lay down the rules at page 454, paragraph second, "The owner has the right to dispose of his prop- "erty, in the first instance, at his pleasure. And the ex- "tent of the burdens, trusts, and conditions, annexed to a "grant is to be learned by reading the instrument and "gathering from it the intent and purpose. Where the "conveyance is made for the security of the surety, and "the property is not by the terms of the instrument spe- "cifically bound to the creditor, the primary intent appar- "ent on the face of the writing is that the property is not "pledged to him for the debt. * * * Courts enforce "contracts, or give redress for the violation of them, *as*

"*made by the parties. By construction they cannot enlarge* "*them beyond their fair intent and meaning, nor, on the other* "*hand, so limit them as to fall short of that.*" "Where the contract of mortgage or other security is given to the surety, not to secure the debt or provide a fund for its payment, but to save the surety harmless from contingent loss or liabilty, that contingency must come before the indemnity inures to the creditor. Where the contract is for the personal benefit of the surety, in opposition to the idea of a pledge for the debt, or providing means for its payment, the creditor can only claim such rights as the surety has." "Where the creditor seeks to appropriate to his debt the collateral indemnity of the surety, it must appear *that the security is for the debt*, as well as for the ultimate protection of the surety." And the court construed the deed of trust in that case to be "merely personal indemnity to the sure-"ties and not a pledge or security for the debt," and dismissed the bill."

7 Conn. R., 748. A. D. 1829. Opinion of Bissell, J. Homer v. Savings Bank.

The Eagle Bank had outstanding more than $500,000 of its post notes, endorsed by Holly. The bank executed a deed of trust *to secure, indemnify* and *protect* Holly against and concerning any indorsement of his on the post notes of the Eagle Bank to an amount not exceeding $20,000. Plaintiffs, as holders of these outstanding post notes, sought by bill in equity to enforce this trust, on the ground of this being a trust for them. The court held the security *was for the personal indemnity of Holly*, and *not for the better protection* or *payment of the debt*, and hence the creditor had no trust or interest in it.

7 Cranch R., 94. A. D. 1812. Opinion by Marshall, Ch. J. Russell v. Clark's executor.

Deed of trust, "to pay Joseph and William Russell the amount that shall be recovered and paid from them to Nathaniel Russell, upon account of a letter of credit, etc., and for which the said Nathaniel Russell has recovered a judgment against said William and Joseph Russell."

The court held: "No part of this judgment has ever "been paid, and Joseph and William Russell are insolvent. "The state of things then, has not yet occurred, in which "Joseph and William could demand the execution of the "trust; and the court, though with some hesitation, feels "constrained to decide that, under the terms of this trust, "Nathaniel Russell, claiming through Joseph and Wil- "liam, cannot demand its execution directly to himself." p. 94.

In the same case was an assignment in trust "to pay Joseph and William Russell all such moneys as they shall be liable to pay, as guarantees as aforesaid, to Nathaniel Russell upon bills, &c., reciting the bills for which this suit is instituted."

Now here was a trust to place in the hands of Joseph and William, *funds to meet the debt due Nathaniel Russell* from the mortgagor, and Joseph and William as joint debtors. This was placing in their hands *a fund in trust* to meet this joint debt.

The court say: "It is settled in this court, that the per- "son for whose benefit a trust is created, who is to be the "ultimate receiver of the money, may sustain a suit in "equity to have it paid directly to himself."

2 Johnson's Chan. R., 418. A. D. 1817. Phillips v. Thompson.

R, a maker of a note, gave a judgment bond to the endorser to indemnify him against his endorsement. The chancellor held, in the last paragraph on page 412, that the holder, Bronson, had no right to the judgment bond as a trust in his favor, created by the contract or agreement by which the maker assigned it to the endorsers. He says the agreement shows that the judgment bond was taken on the account exclusively of the endorsers, and for their indemnity; hence he rejects the claim of the holder to this judgment bond on this ground of trust, as created by the contract of assignment, and places it on the ground that the judgment bond, having been assigned by the maker of the note to his endorsers, for their benefit solely, and as indemnity to them, they had the right to pay the note and resort to the assigned judgment bond for their indemnity; and they had an equal right to assign the judgment to the holder, and thus obtain their discharge, if they thought proper.

This case does not decide affirmatively the first proposition stated in the head note, "that a holder of a note is entitled to the benefit of a collateral security given by the maker to the endorser for his indemnity." But it decides the reverse, to wit, "that the holder is not entitled to the benefit of a collateral given by the maker to the endorser for his indemnity, unless the agreement can fairly be construed to be for his benefit, or the protection of the debt to him, or unless the endorser assign it to him."

The case of Moses v. Murgatroyd, 1 Johnson Ch. R., 119, and of Kip v. The Bank of New York, 10 Johns. R.,

55, simply decide, when carefully examined, that if a surety has realized from a pledge or mortgage given as indemnity, and has the proceeds in his hands, a court of equity will on a bill by the creditor, compel the application of the funds to the payment of the debt.

29 Conn. R., 26. A. D. 1860. Ellsworth, J. Opinion.
Jones and New Haven Bank v. Quinnipiack Bank.

The Jerome Manufacturing Company conveyed its land and improvements thereon by a mortgage to Barnum, conditioned, "that whereas said Barnum has this day become the endorser and acceptor on the bills and notes of the grantor, or on bills and notes for the benefit of said grantor, to the amount of $50,000, and may also continue to be acceptor or endorser upon the bills or notes to that amount, either in renewal thereof or anew, now, therefore, if the said grantor shall pay at maturity all such acceptances, or notes and bills, and save harmless said Barnum by reason of his said endorsements and acceptances, at any time outstanding to that amount, then this deed shall be null and void, but otherwise of full force and effect in the law." On the day this deed was executed, Barnum, upon the security of this mortgage, accepted bills drawn on him by the company, to the amount of over $50,000; three of which were held by the complainant, the New Haven Bank, at the time this suit was brought, and the others by the co-complainant, Jones.

This suit was a bill in equity by Jones and the New Haven Bank to compel a foreclosure of the above mentioned mortgage. The defendant, the Quinnipiack Bank, resisted, on the ground that, after the execution of the above mortgage and the making of said acceptances, in consideration

of a loan by the Quinnipiack Bank of $30,000 to the mortgagor, the Jerome Man. Co., on its bills accepted by Barnum, he, Barnum, had, with the consent of mortgagor, released this mortgage, and a new mortgage was executed to the Quinnipiack Bank to secure the above loan of $30,000.

Complainant's counsel insisted that the first mortgage was given to secure the bills held by complainants, that is *the payment of the debt*, and *not for the personal indemnity of the acceptor, Barnum;* for the language of the condition was: "*Now, therefore, if the grantor shall pay at maturity all such acceptances,*" etc., and this condition could only be fulfilled by the payment of the acceptances. And the principle applicable to this was: "Whenever a mortgage is given to secure the payment of a debt, any party holding the debt has a right as a matter of contract, to claim the mortgage shall be appropriated to the payment of the debt intended to be secured by it; and no matter how the debt may be modified, or into whose hands it may come, the pledge accompanies it and remains for its redemption until it is paid."

Counsel for defendants insisted that the mortgage was given for the personal security of Barnum, an accommodation acceptor, and not for the security of the paper itself. That this was clear from the language of the mortgage. This being so, Barnum had a perfect right to release the mortgage as he had done, and make the new arrangement of transferring it as security to the Quinnipiack Bank for the new loan.

The court held with defendant, saying, at page 39, paragraph second: "We consider the deed to Barnum to have

been given for the exclusive purpose of saving him harmless from the acceptances and endorsements he might give for the mortgagor, the Jerome Manufacturing Co. This was the very language of the deed and clearly its only object. Not a word is said about a trust or fund for third persons; nor, we are sure, was anything of the kind in the minds of the parties;" * * "and we may remark, that there is nothing in the phraseology of the condition of the deed, 'that the mortgagor is to pay the acceptances and endorsements,' which distinguishes it from an ordinary mortgage. The language points out the mode in which the Jerome Manufacturing Co. agree to save Barnum harmless from his liabilities. The mortgage is both in effect and form for indemnity. And the endorser could therefore bona fide release and return it to the owner."

16 Conn. R. 139. A. D. 1844. Opinion by Waite, J. Thrall v. Spencer.

Andrus endorsed three notes made by Barber, for the accommodation of Barber. To secure Andrus, as endorser, Barber mortgaged to him by one deed certain lands, and by another certain articles of household furniture. After these notes had gone into the hands of a *bona fide* holder, the plaintiff, a release of the furniture from the mortgage by Andrus was made to Barber; and the latter, immediately afterward, mortgaged the same to the defendant Spencer. When these last conveyances were made, the parties had full knowledge of the former mortgage of the furniture, but acted without fraudulent intent. The plaintiff, as holder of the notes made by Barber and endorsed by Andrus, seeks to enforce the first mortgage on the furniture, notwithstanding the release by Andrus, and the

subsequent mortgage to Spencer. The court denied the relief, saying: "In the first place, plaintiff has no legal title. The first mortgage of the furniture *was not made to the holders of these notes, but to the accommodation endorser, for his security.* Even if Andrus were still the holder of the property the plaintiff could only reach it through the intervention of the court of equity. But he has taken an assignment of the notes without making any claim for the property while Andrus retained the title. He has lain still until the latter had parted with that title and the possession, and the property has gone into the possession of a *bona fide* holder, for a valuable consideration. He therefore comes too late for relief. *His case does not stand upon as high ground as if the mortgage had been made to the creditor to secure* THE PAYMENT OF THE DEBT. *It was made to an endorser, not to secure the payment of the debt, but to secure him on account of his liability as an endorser. The latter may well relinquish his pledge, provided he acts in good faith, and without any fraudulent design, before any claim is made upon him for the property.*"

18 Ohio R., 35. A. D. 1849. Caldwell, J. Opinion. The Ohio Life Ins. Co. v. Reeder et al.

Bill in equity and demurrer. Demurrer sustained.

Complainant sought to foreclose a mortgage given by the principal and primary debtor to his accommodation endorser *to secure and save him harmless against certain endorsements.*

Held this was a mortgage not given to secure the debt, nor to raise a fund to pay it with. If so a court of chancery would hold the mortgagee as trustee of complainants, and subject the property to payment of the debt.

Vol. 1, Part 1, Leading Cases of Equity. Dering v. Earl of Winchelsea.

The author says, at p. 175: "On the other hand, where the security is given solely for the protection of the surety, he may waive a privilege created for his benefit, and the creditor has no interest in the grant that can supply the want of privity of contract. His right can rise no higher than that of the surety, through whom he claims, and *will be subject to any defence that would have been valid against the surety. Whether the surety shall retain or surrender such an indemnity is a question for him alone to consider, and if he elects to give it up, and rely solely on the credit of the principal, a court of equity will not overrule his determination at the instance of a creditor.*"

Now let us apply these rules and authorities to the case at bar. By the first, the enacting section of the act, the nature, qualities, character and parties to the State bonds to be issued, are set forth, and they are declared to be the coupon bonds of the State of Tennessee, as primary and sole obligor, with no obligation of the company contained in or expressed on them, and, indeed, with no reference to the company on them, and with no mark or other mode whatever prescribed by the act to identify them as issued to any railroad company, and with no means provided by the statute, either on the bond or otherwise, to point or lead the bondholder to the company to which his bond was issued; not even was the act under which the bonds were issued required to be printed on, or expressed, or referred to in the bond.

And as the act gives, to the company expressly, the contract privilege of paying the principal of its debt to the

State in any bonds of the State, thus totally excluding the obligation to pay the identical bonds issued to such company;

And as the act expressly reserves to the State the power to enact any legislation in future touching this debt of the company and lien on its property, that may be deemed proper or necessary to protect the interests of the State, limited only by the vested rights of stockholders;

It clearly appears that the company, under this act, is the debtor solely of the State, and owes no obligation to the bondholders; and that the lien was created solely for, and vested in the State, and was not intended as a trust for the bondholders.

Hence, the State had a right to assign or release the lien, and the bondholder cannot enforce it either against the company or the assignee of the State after she has parted with it.

AS TO THE PRACTICAL AND CONTEMPORANEOUS CONSTRUCTION PUT UPON THE CONTRACT.

We now submit to the court, that from the passage of the act of February 11, 1852, ch. 151, up to the institution of this suit, in February, 1879, the railroad companies, the State, and the holders of the State bonds issued to the railroads, including the present complainants, have by their uniform and continuous conduct, in dealing with the bonds and coupons, and payments by the companies of their interest and principal, and in seeking payment of their bonds and coupons by the holders, and in the remedies adopted by the State, and in the fulfillment of all the conditions and stipulations of the contract, and in modifying them by the State, the bondholders and the companies

practically construed this statute in strict harmony with interpretation we have herein insisted on ; and this practical construction is the proper guide to its meaning, and is of controlling influence and of more importance than the mere abstract meaning of the phraseology.

We first submit the following authorities as establishing the rule and illustrating its application :

16 Howard R., 513. A. D. 1853. Opinion of Mr. Justice Grier. Irwin v. United States.

The United States filed a bill *quia timet* v. Irwin, to enjoin him from cutting certain pipes conveying water to the United States Arsenal at Pittsburg. The United States claimed the right to use one-half of the water delivered from a certain spring, under a deed made to the United States in November, 1836, for $2500.

The question was whether the deed, by its terms, conveyed "*one-half of the water*," to the Government. By the terms of the deed, "*the water is to be delivered to each of the two owners by a pipe of equal diameter at the same level.*" But it was proved that the distance was greater from the spring to the point where the Government used the water, than to that of Irwin, and owing to friction and other causes, the flow of water in equal tubes is in the inverse ratio of the squares of the distances. Hence tubes capable of receiving and passing equal quantities at the spring or fountain head, would have distributed to the United States about one-sixteenth, and to the vendors fifteen-sixteenths.

In answer to this testimony the United States proved, as matter of contemporaneous and practical construction, "that the Government was permitted to conduct its share

of the water in tubes without any restriction as to size. Robinson, one of the grantors, testified that one-half of the water was sold, and one-half reserved, *that such was the agreement.* This was the practical construction, and the officers of the United States proceeded to make a common cistern, and to ascertain the size of the two pipes sufficient to convey the whole water held in common, and distribute it equally, using from that point pipes of such size to convey the water to the Arsenal as was deemed necessary from the distance and nature of the ground. The vendors looked on, assisted and acquiesced in all that was done. This course had continued for sixteen years." The court held at page 283, "*If the deed were ambiguous and capable of* "*a construction which would permit one party to overreach and* "*defraud the other,* * * *we have here a practical construc-* "*tion by the vendors and vendee, made on the ground* and *ac-* "*quiesced in for sixteen years. It is conclusive.*"

10 Wallace R., 377. A. D. 1870. Opinion of Swayne, J.

"Where there is doubt as to the proper construction of an "instrument, its practical construction by the parties is "entitled to great consideration."

9 Wallace R., 50. A. D. 1869. Opinion by Nelson, J. Chicago v. Sheldon.

In February, 1859, by charter, the Chicago City Railway Company was granted the franchise of constructing and operating a street railway through certain streets in Chicago, on terms to be agreed on with the city. By the contract, the company agreed—"to keep eight feet in width "along the line of its track on all streets where it had "one track, and sixteen feet where there were two tracks,

"in good repair." The company kept the streets in repair up to 1866, without any effort of the city to lay any other burden on it, but in 1866, when laying an assessment on property owners on a certain street to improve it, the city assessed one-eighth in money on the company. Sheldon, a non-resident stockholder, filed his bill in the United States Circuit Court to restrain the city from collecting this assessment, on the ground that it violated the contract. The relief was granted in the court below, and the decree was affirmed on appeal. At page 54, paragraph 2, the court hold: "*What adds great weight to this view is, it accords with the practical construction given to the contract by both parties.* It was entered into May 23, 1859. Several of these assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the property of the railroad company; nor was any question raised as to the exemption till 1866, and not then by the city, but by some of the proprietors of lots fronting on the street." "*In cases where the language used by the "parties to the contract is indefinite or ambiguous, and hence of "doubtful construction, the practical interpretation by the par- "ties themselves is entitled to great if not controlling influence. "The interest of each leads him to a construction most favorable "to himself, and when the difference has become serious and "beyond amicable adjustment, it can be settled only by the arbi- "trament of the law. But in an executory contract, where its "execution necessarily involves a practical construction, if the "minds of both parties concur, there can be no great danger in "the adoption of it by the court.*" Another consideration in the case is entitled to weight in the interpretation of this contract, and that is the language of the contract made between the city and company in 1864. This ordinance is

in *pari materia* with the one of 1859, and helps to explain any ambiguity in it."

25 Mo. R., 21, 22. A. D. 1857. Opinion of Ryland, Judge.

A partnership was dissolved by consent, and notice of the dissolution given, in which is this clause: "*the name of the old firm may be used in the settlement of the old business.*" The new firm drew drafts in the name of the old firm to renew debts of the old. The testimony showed that the retiring partners had recognized some of these. In a suit against a retiring partner, who pleaded that the notice did not authorize the drafts, the court held at pp. 21–22, "*From all the acts done, and all the circumstances surrounding or attendant on the acts done, in regard to the dissolution and settling or winding up of the old firm, inferences may be drawn showing the meaning practically which the partners had when the notice was given, and their intention when it was drawn. This practical construction given by the parties themselves, is a proper guide to its meaning, and is of more importance than what is the abstract meaning which the court may attach to its mere phraseology.* The business of a court and jury is to ascertain the meaning and intention of parties in making an agreement, and to carry that into effect, if it is consistent with law. *I know of no better mode of ascertaining this meaning than is shown if all parties acted on a particular meaning.*"

2 Watts & Sergt., 172. A. D. 1841. Houston, Judge.

Question on the liability of a dissolved firm on a note given in the firm name by one partner, after dissolution, for a firm debt. The court held them bound on a practical construction, using the very language of the last sen-

tence above quoted from the 25 Missouri case, beginning, "The business of the court is," etc.

46 Mo. R., 127. A. D. 1870. Bliss, Judge. St. Louis Gaslight Co. v. City of St. Louis.

Under the charter of this gas company it was permitted to contract with the city for supplying it with gas. It did make such contract in writing, agreeing to construct and supply two hundred and sixty-three lights at a fixed and ascertained price for the gas to be consumed at each, to-wit, $25 per annum for each, with the further stipulation that the company should erect such additional lights as the city should require. The contest was, whether under the contract the company was obliged to furnish the additional lights at the same price as that fixed for the first two hundred and sixty-three, or was at liberty to charge more.

There was no express stipulation in the contract which fixed the price of the additional lamps at $25 per annum; it depended on construction. But it was proved, that the city demanded, from time to time, the erection of new and additional lights; they were erected and kept lighted by the gas company through a series of years at an annual charge of $25 for each, the same as the first 263, and this conduct had extended through a period of twenty years, from 1846 to 1866, without the company ever demanding any additional price for the new lamps and lights. The court held this to be a practical construction by both parties, which must control and fix the construction.

At page 128, the court say: "If the court leaves the "parties to be governed by their own understanding of "their own language, it in effect enforces the contract as

"actually made. That they should be so permitted to "construe their own agreement, accords with every prin- "ciple of reason and justice. The continuous conduct of "the parties for a series of years concerning the subject "matter of the contract, and in fulfillment of its condi- "tions — every act pointing in the same direction — may "make their understanding as clear as by the greatest "precision of language."

In 10 Wall., 377, R. R. Co. v. Trimble, the rule is stated and approved, but held inapplicable, as the contract was clear of doubt.

In Breedlove v. Stump, 3 Yer. 265, 266, "If the meaning were in any respect doubtful, the parties themselves have placed a construction upon the instrument by their *acts*, as well as words, which I do not feel at liberty to disregard."

12 Wheaton R., 210. A. D. 1827. Opinion of Trimble, J. Edwards v. Darby.

A law did not in terms require certain commissioners to survey and mark out the limits of a reservation of 640 acres around Salt Licks and Salt Springs reserved from the right of entry, but the Commissioners did survey them, and mark them out.

Held, at p. 210, second paragraph:

"*In the construction of a doubtful and ambiguous law, the contemporaneous and practical construction of those who were called upon to act under the law*, and WERE APPOINTED TO CARRY *its provisions into effect, is entitled to very great respect.*" The law was not only so construed by the commissioners, but the construction seems to have received, very shortly after, the sanction of the Legislature.

The opinion of Chief Justice Marshall is to the same effect in 5 Cranch R., 22, McKeen v. Delancey. This is an instructive case as to the evidence of practical construction.

The Supreme Court of Massachusetts, in a case maturely considered, held that a contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms made use of by the Legislature. If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the Legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law.

Packard v. Richardson, 17 Mass. R., 144.
Rogers v. Goodwin, 2 Mass. R., 477.

What are the facts evidencing this practical construction?

When the bonds were issued to the various railroad companies the officers of the State did not instruct the railroad companies to take any measures to preserve a record of identification of the bonds and coupons issued to them, so as to enable them to pay the identical bonds and coupons loaned to them, respectively; nor did the railroad officials adopt any such measures, or even preserve their numbers. This would unquestionably have been an object of their first and highest solicitude had they understood that they were liable to pay the identical bonds and coupons issued to them, and that the lien existed on their property to secure the payment of the principal and interest of the bonds to the holders.

The bonds and coupons, as issued, did not contain in, or on them, any marks or indicia whatever pointing the purchaser to the railroad company they were issued to, or indicating that they were obligations of a railroad company, or were protected by a lien on the property of any company.

The bonds, when sold originally, were negotiated in every instance as straight State of Tennessee bonds, without any other supporting liability or lien than the plighted faith and credit of the State of Tennessee, and were so purchased; and they have been uniformly so sold and bought ever since, and have always brought the same price with other State of Tennessee bonds of the same denomination and character.

See Deposition of J. G. M. Ramsey, page 675.
Deposition of J. J. Craig, pages 677–78.
Deposition of Columbus Powell, pages 691–92.
Deposition of R. G. Jackson, pages 669–70.
Deposition of Samuel Tate, pages 685–86.
Deposition of Chas. J. McKinney, pp. 681–82.
Deposition of John S. Claybrook, pp. 715–16.
Deposition of V. K. Stevenson, pages 698–99.
Deposition of Campbell Wallace, pages 738–39.
Deposition of R. T. Wilson, pages 878–79.

The complainants themselves prove they bought their bonds without knowing to what railroad they had been issued, or that they were issued under the acts of 1851–2 and amendments until after the bonds were delivered in consummation of the sales.

See the deposition of Peter Geddes.
Deposition of J. T. Terry.
Deposition of Eugene Kelly.
Deposition of C. A. Stevens.

The testimony shows that the bonds were sold and bought as bonds whose sole obligor was the State, and with no lien but her plighted faith, and have, therefore, rose and fell uniformly in price, as straight State bonds issued purely for State purposes. This uniformity of price has prevailed between bonds issued to insolvent and solvent companies.

Again, the railroad companies have uniformly kept their interest accounts so as simply to show the aggregate amount due semi-annually, and have kept it as an account between the company, as debtor, and the State as sole creditor. They have never kept, nor attempted to keep, their interest account as for so much due on the coupons of the bonds issued to them, or to the holders of such coupons, and never were required or instructed by the officers of the State to keep such an account.

But those of them who had bonds of their own, endorsed by the State, outstanding, did keep such an account as to these endorsed bonds, because they understood they had the identical coupons on them to pay as their own obligations.

In making their semi-annual payments of interest to the State, they paid it as interest due the State, and never as a simple deposit to pay the identical coupons from the bonds issued to them respectively, and the payments were receipted for by the officers of the State, as so much interest due from the company to the State.

They uniformly paid their interest, either in money or in coupons from any State bonds, so the coupons were overdue, or matured fifteen days after the payment of in-

terest due from the company, and which it was paying. The companies were never instructed or required, and never attempted to get up for payment the coupons from the identical bonds issued to the company making the payment.

The officers of the State, that is, the Bank of Tennessee, never kept nor attempted to keep the interest accounts of and with the railroad companies so as to apply the interest paid in by them to the coupons of the bonds issued to the company paying. They were wholly without the data to do this, and never attempted it. They only kept the accounts so as to show the amount of interest due semi-annually from each company, and the amount of its payments. The accounts of their agents in New York were kept in the name of the State and coupon account, and all coupons from all State bonds were paid from the general funds of the State by said agents, and no effort was made to apply the money paid by a company to the coupons of the bonds issued to such company. No effort was made to keep the money paid by a company as a fund to pay the coupons from the bonds issued to that company.

See the deposition of Claiborne, p. 857–859, and Seay, p. 820–21, and the agreement as to the accounts of the Merchants Bank of New York.

See also the depositions of Jackson, p. 671–2, Wallace, p. 641–2, and Tate, p. 686–7.

The sinking fund payments were made in any bonds of the State, and were passed directly to the credit of the company, and after the act of 1860, ch. 93, passed March 20, 1860, were cancelled.

This act of March 20, 1860, ch. 93, at p. 279, is a clear and plain construction by the Legislature of the act of

February 11, 1852, ch. 151, and especially of the seventh section, and of the obligation of the company to the State, and of the character of the lien. The sinking fund payments and accrued interest are directed by the first section "*to be passed directly to the credit* of the railroad company "which paid it, *and be a release to it for that amount of the* "*debt due by said company to the State.*" The second section requires all the bonds so paid in to be cancelled.

By the third section, the annual payments are increased to two and a half per cent. on the amount of bonds that had been loaned to the company, or might in future be loaned.

By the fifth section, the right given by the original seventh section to pay in any State bonds is limited to cash or in the like character of bonds that had been issued or endorsed to the company.

By the sixth section, if said payments are made in cash the Commissioners are required to invest it immediately in bonds of the State and cancel them.

By the seventh section, the sinking fund when paid is in all cases to be passed directly to the credit of the company and be a release to it of that amount of the debt due by it to the State, and the Commissioners shall issue a receipt to the company for such payment.

By the eighth section, each company is required to pay the interest semi-annually on the amount of bonds unpaid at the time.

This act does not require construction. It expressly makes the payment annually of the two and a half per cent. on the amount of bonds loaned, a discharge of that

amount of the company's debt to the State, and allows these payments to be made in any State bonds of the same character as those issued to the company, and requires them to be cancelled, and the company paying them to be credited by the amount.

To allow and require the company to make these annual payments to the State, years before the bonds matured, and in other bonds of the State, to be cancelled as paid in, thus annually satisfying a portion of the company's debt, is a practical denial, of the most vital and effectual character, of any obligation of the company to holders of the State bonds issued to the company, and of any lien on its property to secure the State bonds issued to it.

On the 23d of November, 1865, the General Assembly of the State of Tennessee passed an act, ch. 9, p. 10, of the Public Acts of 1865–6, entitled An act to amend an act entitled an "Act to establish a system of Internal Improvements in the State," passed the 11th of February, 1852.

By the first section the Governor was authorized to issue the six per cent. coupon bonds of the State, similar in character in every respect to the bonds issued under said act and maturing at the same time, to an amount sufficient to pay off all the bonds and interest past due, as well as that to fall due January 1, 1866, or on any that may fall due during 1867, issued or endorsed previous to the 6th day of May, 1861.

Section second requires the bonds to be dated January 1, 1866, and to be payable January 1, 1892.

Section third enacts they shall not be sold, exchanged, or negotiated at less than par; but they may be exchanged

for the interest coupons and bonds hereby provided to be paid, estimating each at their par value.

Section fourth enacts that the amount of interest then due or to become due by January 1, 1866, *by any railroad company to the State* on bonds issued to said company, shall be charged up to said company, on the same terms and conditions of the original loan under the law this is intended to amend, and the State shall have the liens upon each of said roads, their franchises and property, for the prompt and faithful payment of the principal and interest of the bonds hereby authorized to be issued to pay the interest on the bonds said company should have paid interest on, as it has under the law this is intended to amend, for the bonds issued under said law.

Section five requires the companies to pay the interest on said bonds, as it matures, in the same manner and under the same rules, regulations and restrictions as they are now required to pay on the bonds issued under the former act. Commencing the payment of said interest *on the fifteenth of June*, 1866, not the first of July, when the interest on the bond fell due, but fifteen days before, when the act of 1852 required payment to the State by the company.

Section six suspends the act of March 20, 1860, requiring the companies to pay into the State treasury two and a half per cent. per annum as a sinking fund, *on the amount of their indebtedness to the State* to January 1, 1867, and *relieves them from the payment of the sinking fund then due under said law.*

Section seven requires every company who have, or may receive aid under this act, or the act of February 11, 1852,

or any amendment thereto, to pay *to the Treasurer of the State, during 1867, four per cent. on the amount of the indebtedness of the State, as a sinking fund on said debt, to be paid in the bonds of the State of a like character to those issued to said company, with the coupons of the same, that have not matured, the payments* to be semi-annual *until the whole of their indebtedness is paid.* The Governor was authorized to sell and negotiate the bonds to pay the interest or *exchange said bonds with the holders of said coupons so as to pay and liquidate the interest.*

It is to be observed that this act embraces the past due coupons on all outstanding bonds of the State as fundable under its provisions, for "*it is for an amount sufficient to pay* "*off all the bonds and interest past due, that had been issued* or "endorsed prior to the sixth of May, 1861," and it allows them to be exchanged for the interest coupons and the bonds overdue, estimating each at their par value. See sections two and three.

And this was practical administration of it.

Gaines, the Comptrolier of the State, testifies and proves that the entire overdue coupon debt of the State was funded into the new bonds under this act. See his deposition, p.

It is to be further observed that the overdue interest owing by any company was, by the fourth section, "*to be* "*charged up to the company as part of the original loan with* "*the same lien*, and are to pay the interest on it in the same "manner and under the same rules, regulations and restric- "tions."

Gaines also proves that the overdue interest of each company was, under this act, charged up to it as part of the principal.

This act recognizes the act, ch 93, of March 20, 1860, as an amendment to and part of the act of February 11, 1852, and suspends the two and a half per cent. per annum sinking fund fixed by the act of 1860 to January 1, 1867, and then increases it to four per cent. It then, in section seven, re-asserts the legislative construction made by the act of 1860, that the debt of the companies for the loan of the State bonds *is an indebtedness to the State*, and just as that act did, this one requires the annual payments *on this debt, to be paid in the bonds of the State of a like character to those issued until the whole of their indebtedness is discharged.*"

This act was a legislative construction of the act of February 11, 1852, ch. 151, and of the amendatory act of March 20, 1860, ch. 93, declaring that the debt of the companies for State bonds loaned to them was owing solely to the State, and was payable and should be paid to the State, and not in the identical bonds of the State issued to a company, but in any State bonds of a like character. It therefore clearly and directly denied any liablity of the company to the holders of the State bonds issued to such company, or any lien in their favor. In nothing is it more striking as a construction than in the plain implication that it contains that the payment of interest contemplated by the act of 1852 is the anticipated payment to the State, fifteen days before the interest on the bonds fall due.

The provisions of this act were carried out and executed by the State, by all the railroad companies, and by all the holders of the bonds of the State issued to the railroads. The State, by its Governor, issued the full amount of bonds under this act, and exchanged them at par for all the overdue and unpaid coupons on the State bonds; *and* all the holders of such coupons surrendered them for can-

cellation to the State, and accepted the bonds in lieu thereof. The State charged up the amount of overdue and unpaid interest owing to her by the respective companies, as part of the principal debt, and the companies accepted and recognized this charge as proper. But the holders of the State bonds did an act, in availing themselves of the benefits of this act, of the utmost significance as a practical construction of their rights. The deposition of Comptroller Gaines, and the Exhibits thereto, prove that under this act all the unpaid coupons, that fell due prior to, and on the first day of January, 1866, were funded into and exchanged for the new bonds; and that the holders did not fund their coupons so as to preserve the identity between the new bonds and the coupons from the bonds issued to the particular railroad companies.

The new bonds represented and were funded from all classes of bonds indiscriminately. In other words, the holders of State bonds, having overdue and unpaid coupons, that had matured during the war and up to the first of January, 1866, did not attempt to fund their coupons from bonds issued to the respective railroads, so as to preserve, or be able to trace the new bonds, as renewals of the coupons from the bonds issued to the respective railroad companies; but they indiscriminately funded all their coupons into straight State bonds not traceable to any particular class of bonds or coupons.

It seems to us that these positive acts of the holders of the State bonds issued to the railroad companies, passing by the companies, making no demand of payment of them, instituting no suit, nor other proceeding against them to enforce the collection of the overdue unpaid cou-

pons, but taking a new security from the State not traceable as a renewal of the old, and in consideration thereof, surrendering the old coupons from the bonds issued to the respective railroad companies; and this under an act of the Legislature wherein the State asserted herself to be the sole creditor of the railroad companies and the sole and absolute owner of the lien, and demanded of, and stipulated with, the railroad companies for a mode of payment, and payment in her own obligations, which would satisfy such debts before the maturity of the bonds, and deprive these bonds of any benefit from the payments so to be made by the railroad companies, is practical construction of the most solemn and convincing character by the State, by the companies, and, above all, by the bondholders. Especially is this so, when we add the further facts, that the courts were open, and this first lien, if it belonged to the State bondholders, could have been enforced against the companies and their property, and would, as a first lien, have realized the money, in a large degree, to pay the bondholder's claim, and still have left the balance of his claim in full force against the State. At this time, too, all State bonds and coupons were down as low as fifty cents on the dollar, there being no difference in their market value, and hence the bondholder was not only surrendering, if he had it, his immediate remedy and its fruits as against the railroads, but he was taking a security which was only worth fifty cents on the dollar, and never could be asserted against the railroads. But he not only did not seek payment from the railroads, in the assertion of the obligation against them, and the lien on their property, now for the first time set up, but he took, under the circumstances just stated, a new obligation from the State as

sole obligor, and not traceable to the bonds issued to the respective companies; thus asserting by his own solemn action, when he was called on by the most urgent and imperative demands of interest, to set up the contrary if he believed it existed, that the State was his sole and primary debtor, and that the company owed him no obligation, and he had no interest in the lien.

The testimony of Gaines and of the public records of his office, as Comptroller of the State, shows, too, that each and every holder of the coupons surrendered them in person and gave a personal receipt for the new bonds issued to him in lieu of the surrendered coupons, thus bringing home to them direct personal knowledge of the facts, besides the conclusive presumption of law, that those who take a benefit under an act or contract, have knowledge of such act or contract. The testimony of Gaines shows that all the overdue, unpaid coupons from all the State bonds, then outstanding, were funded under this act, so the above facts and practical construction is applicable to all the State bonds issued to railroads, and then and now outstanding.

Thus it is shown that the bondholders, did, under this act, make a new contract with the State, wholly ignoring the railroads and their property as subject to any claim by the bondholder, and this, as before remarked, when the courts were open, when the railroads were in full operation and subject to legal process and jurisdiction; and when by suit, if the bondholder had the claim and lien now set up, he could have collected a part, if not all his debt as first lien, and still held the State for any balance uncollected. He took this new security, too, when all

State bonds were all below fifty cents on the dollar in value; as well those issued to railroads, as those issued for purely State purposes, and confessedly resting alone on the good faith and credit of the State.

This invariable uniformity of value between all classes of State bonds, whether issued purely for State purposes or to railroads, was a practical construction by capitalists and the commercial world, and holders, and purchasers, of the utmost significance, in showing that all the bonds were construed as simple debts of the State alone, resting solely for payment on her plighted credit and faith. They all rose in value with her credit, and sunk as it ebbed. Just here is presented another fact of practical construction by the railroad companies of convincing force to show that the companies universally and uniformly held the confident opinion that their indebtedness for the loan of State bonds to them was to the State solely, and the lien on their property existed solely to secure that to the State. The fact is, that notwithstanding the bonds issued to them were of uniform price with the other State bonds, yet they never, when buying State bonds to make their annual payments, or their final settlements under the acts of 1869 and 1870, attempted to buy up the bonds issued to them respectively; although, as said, they could have bought them at the same price as other bonds. Had they construed their obligation as due to the holders of the bonds issued to them respectively, and the liens as trusts for the payment of those bonds, it would have called forth their most anxious solicitude, and their utmost diligence to hunt up those bonds.

AS TO ACQUIESCENCE AND ESTOPPEL.

This record shows that not only were the holders of these bonds so issued to the railroad companies anxious and persistent in getting the State to settle with the railroads upon the terms set forth in the various acts of the Legislature, but they even funded their coupons on their railroad bonds with coupons of other general bonds, treating them of equal grade, and without any effort to keep up, identify or distinguish them.

They did not, from 1867 to 1874, demand the payment of a single company, brought no suit, but acquiesced knowingly in the passage of the acts of 1869 and 1870, and approved of their operation, workings and effect till 1874, until every insolvent road had been sold out under foreclosure proceedings, under these acts, and until every solvent road, except three, had made final settlement with the State; and finally, in 1874, funded all their past due coupons, under the act of 1873, into new thirty-year pure State bonds, and registered their old ones under the same act.

But what evidence is there that they knowingly acquiesced in the settlements of the companies with the State under the acts of 1869 and 1870?

The testimony of Maj. R. T. Wilson shows how publicly the sale of the company substitution bonds were advertised in the city of New York, and how publicly the State bonds were bought up to pay the State.

So, too, Gov. J. C. Brown proves how thoroughly they were informed by the approving letters they wrote him.

So, too, they prove themselves that early in 1870, before a single railroad had settled with the State, they, through a committee, solicited and obtained the opinion of Messrs. Davies & Davis as to the effect of these acts on their rights.

As Maj. Wilson and Mr. Iselin testify, this opinion was disregarded as of no value, as worthless; and one reason for this was, it was rejected, it fell still-born with those for whom it was prepared, and to whom it was addressed.

Their silence and non-action, in disregard of its advice, in 1870, when the settlements under the acts began to be prosecuted by advertisements by the railroad companies for bids to purchase their substitution bonds with the lien, in New York City, in Philadelphia, in all the principal cities, added a new and notorious fact of practical construction by the State bondholders tending to induce and actually inducing capitalists to venture their money on the sure ground that all parties, the State, the railroad companies, and the State bondholders held but one harmonious understanding of this contract.

The testimony in this record is plenary, and is uncontradicted, that the facts and acts of practical construction by the State bondholders from 1865 to 1870, in funding their unpaid coupons under the act of Nov. 23, 1865, and that their unpaid coupons that fell due from January, 1866, to July, 1870, were not demanded by the railroad companies at all during all those years.

He further proves in regard to the Davies & Davis opinion, that it was regarded as worthless, "because as long as "the parties to whom this opinion was addressed, and in "whose interest *it was apparently written*, did not act upon

"it, *it was proof* that they themselves considered this opin-
"ion unsound, and *did not consider* they could maintain
"any claim against the railroads for the bonds they held
"from the State of Tennessee. The parties in whose in-
"terest this opinion had been written having attached no
"importance to it, I did so neither."

This same witness proves he, as a capitalist, knew of all the fundings, and of the non-claim against the railroads by the State bondholders from 1865 to 1870, and from 1870 to 1877.

He knew, too, of the urgency with which these complainants, through Mr. Geddes, had importuned the railroad officers and State officials to complete these settlements with the State.

The universal and active approval of the acts of 1869 and 1870 by the State bondholders from 1869 to 1877 is fully proved by the testimony of Gov. John C. Brown. See his deposition, pages 1185–6–7, as follows:

"The acts of the General Assembly providing for the
"sale of delinquent railroads, as well as the acts of Febru-
"ary 25th, 1869, and January 20th, 1870, enabling the sol-
"vent railroads to retire and cancel their debts to the State
"in the bonds of the State, originated in and were pro-
"duced by the sentiment universally prevailing, that such
"measures would at once subserve the best interest of the
"State, and at the same time benefit the holders of State
"bonds. It was believed that course would be of benefit
"to the State in retiring to that extent her debt, and to the
"bondholder in the reduction of the debt, thus enabling
"the State better to provide for so much as should remain

"unpaid, and advancing the credit of the State. The "railroads also were favorable to the legislation, because it "gave them the opportunity of removing the first or pri- "mary lien upon their property to the State, by a payment "in bonds of the State."

"Prior to my inauguration as Governor, as well as while "in office, I had frequent communications with holders of "Tennessee bonds, both in personal interviews and through "written communications. I cannot now specify particu- "larly parties with whom I had communications, nor did "I preserve the correspondence so as to refer to it. I "remember that I had frequent interviews with Mr. Demp- "sey Weaver, who was a holder of Tennessee bonds and a "leading business man of Nashville. As an individual "and as President of the Third National Bank of Nash- "ville, I understood him to be the agent and correspond- "ent of many holders of Tennessee bonds in New York "and elsewhere. I know that he favored these acts, upon "the idea that they would reduce the debt of the State and "bring it within her control."

"During the whole of my administration the holders of "the bonds of the State were pressing in their demand for "the resumption and continuance of interest payments by "the State, and urged that since the State had been relieved "of a large part of her debt by the sale of her insolvent "roads, there was no reason why she should not be able "to pay interest upon the balance promptly and at once. "No intimation was ever made to me by them, or any of "them, that this legislation was in violation of their rights "or prejudicial in anywise to them. I did not hear from "them any intimation that they looked to the railroads, or

"any of them, for the payment of their demands, either "as to principal or interest."

And Mr. Osborne proves that the State bondholders did not, as he expressed it in his quaint style, "begin to moot "the right of the bondholders to crucify railroads until "*they were defeated in the Tennessee Legislature a year or two* "*after we settled with the State*," in November, 1877.

See Dep. of W. H. Osborne, p. 972, Ans. to 13th Cross-question.

The holders of the State bonds had $3,000,000 of unpaid coupons in 1866; they did not sue the railroads, nor seek payment of them, but they funded all their coupons into new State bonds at thirty years, under a statute which denied the right to the lien on, or obligation of the company, and provided for and compelled the companies to a mode of payment to the State, which would extinguish the company debts long before the maturity of the bonds and payment in any bonds of the State.

The State bondholders acquiesced in the opinion of this act from 1866 to 1870, and although their coupons were dishonored every six months and accumulated from 1866 to 1870, and although the State was enforcing the act of November 23, 1866, yet the State bondholders made no demand upon and did not sue the railroads.

They acquiesced in and approved the acts of 1869 and 1870, passively held their unpaid coupons, and permitted them to accumulate, took no step to collect them off of the railroads, and although warned of their rights and the effect of the acts of 1869 and 1870 by the Davies & Davis opinion, wholly neglected to oppose those acts, though

they knew the companies and capitalists were buying up State bonds to pay the State the full amount of the indebtedness of the companies, and selling on the one side and buying on the other the substitution bonds of the companies with the lien of the State as their only support. They so acquiesced through 1870, 1871, 1872 and 1873, until, as Governor Brown states, every solvent road in the State had made its final settlement except three, and until every insolvent road had been sold by final judicial sale for the same purpose; and then in solemn and deliberate confirmation of all that had been done, they fund, under the act of 1873, all their unpaid coupons, which had been accumulating from 1866 to 1874, to the amount of $4,000,000; and they fund these coupons into bonds not traceable as renewals to the particular bonds issued to the railroads, and this under an act which expressly reserves the State lien against the purchasers of the foreclosed roads, thus asserting its exclusive ownership of that lien.

After 1874 the acquiescence continues; the State continues to default in the payment of their semi-annual interest coupons; they not only continue to forbear suing the road, but they correspond with Gov. Brown, and urge as a reason why the State should pay her interest now, that she has greatly reduced her own indebtedness by her settlements with the railroads.

Again, as late as 1877, when the Memphis and Charleston Railroad Company and the Mississippi Central are making their settlements, the present complainants, J. J. Terry, Calvin A. Stevens and Peter Geddes are found urging these settlements upon Gov. James D. Porter, upon the Comptroller, James L. Gaines, and upon the officers of the companies.

See Dep. of James D. Porter, p. 833.
Dep. of James L. Gaines, p. 781 to 789.
Dep. of R. T. Wilson, p. 867 to 883.
Dep. of Adrian Iselin, Sr., p. 1052 to 1066.
Dep. of Adrian Iselin, Jr., p. 959 to 964.

Here are positive acts of recognition of the adverse claim through a period from 1865 to 1877, or twelve years' acquiescence for the same period.

Non-claim when the most urgent demands of self interest should have prompted legal proceedings in assertion of their rights, not only non-claim, but actual novation, so as to destroy the legal right of suit for the time being.

With full knowledge of the progressing settlements under the acts of 1869 and 1870, with legal advice of their own rights and of the effects on them of these acts of 1869 and 1870, they acquiesce, assert no claim, make no opposition, no protest, although they knew that capitalists were expending many thousands, aye, millions, in the purchase of the substitution bonds of the companies on the faith of their carrying the State lien; although they knew the companies were buying up the State bonds at enormous outlay, and paying them over to the State, where they would be irredeemable forever, on the faith of thus discharging their debts.

Not only acquiescence as above, with full knowledge, but actual approval and encouragement, of these settlements until the last one is made and finally consummated. "There was great laches on the part of the complainants "in asserting their lien, having had abundant opportunity "to do so years ago. Under the circumstances developed

" by the testimony, their laches was wholly inexcusable."

King v. Wilder, 75 Ill. R., 277–8.

Chamberlain v. Sioux City R. R. Co., 2 Otto R., 307.

" Courts of equity discourage stale demands by refusing " to interfere *where there have been gross laches in prosecuting* " *rights, or long and unreasonable acquiescence in the assertion* " *of adverse rights.*"

Story's Eq., sec. 1520.

" A court of equity, which is never active in relief *against* " *conscience or public convenience, has always refused its aid to* " *stale demands where the party has slept upon his rights, or* " *acquiesced for a great length of time. Nothing can call forth* " *this court into activity but conscience, good faith and reason-* " *able diligence.*" Where these are wanting, the court does " nothing. Laches and neglect are always discountenanced."

Smith v. Clay, 3 Bro. Ch. R., p. 640.

Bassett v. Company, 47 New Ham., p. 442.

Six years acquiescence:

" Where a person tacitly encourages an act to be done " he cannot afterward exercise his legal right in opposition " to such consent, if his conduct or acts of encouragement " induced the other party to change his position, so that " he will be pecuniarily prejudiced by the assertion of such " adversary claim."

Swan v. Seamans, 9 Wal. R., p. 274.

2 Otto R., 307. A. D. 1875. Chamberlain v. Sioux City and St. P. R. R. Co. Opinion by Mr. Justice Field.

The court say, in this case, whose facts are fully set forth in this brief, under the head of Construction, as follows: " The long delay of complainant in asserting any claim to

"the lands in controversy, whilst the defendants were con-
"structing, at a vast expenditure of labor and money, their
"railroads, deprives his suit of favorable consideration.
"It does not appear that for twelve years after the aban-
"donment of work by the original Minnesota Company
"on the road, the grading of which it commenced, he set
"up any claim such as is advanced in this suit; on the
"contrary, it is abundantly established that in various ways
"he urged upon members of the Legislature the adoption
"of measures for the construction of the roads, which
"involved an appropriation by the State of the lands in
"controversy, and that after the new companies were or-
"ganized, and the lands were granted to them, he urged
"them to proceed with the enterprises, knowing that upon
"those lands they relied to carry on the works. Under
"these circumstances, it would be manifestly inequitable
"and unjust to grant his prayer."

What was the long delay referred to by the court in this opinion?

The bonds were issued in 1858 and 1859; they had ten to twenty-five years to run to maturity, that is to say, the State had the option to pay them at the expiration of ten years from the date of their issuance; and if she did not, then they matured in twenty-five years from the date of issuance. The State foreclosed the lien as sole creditor of the company in October, 1860, only one and two years after the issuance of the bonds. On the 4th of March, 1864, the State transferred these lands to the defendant companies, under an act of the Legislature of that date. The complainant instituted his suit in 1870; his interest coupons had been falling due and remaining unpaid for

ten years, but not a single bond had matured, and as the State had not elected to pay in ten years, the bonds had still thirteen of the twenty-five years to run to maturity, and the defendant railroad companies had only been in possession for (6) six years. The court held these facts to constitute such laches as to present a bar.

The court also held him equitably estopped, because he delayed to assert his claim by suit, although only his coupons were overdue and dishonored, and, during this delay, the defendants were constructing, and did construct, 167 miles of road, at a cost of $5,000,000, by the new Southern Minnesota Railroad Company; and 170 miles, at a cost of $3,000,000, by the St. Paul and Sioux City R. R. Co.; and because he had urged upon members of the Legislature the adoption of measures for the construction of the roads which involved an appropriation of these very lands; and because, after the new companies were organized, and the lands were granted to them, he urged them to proceed with the enterprises, knowing that upon these lands they relied to carry on the works.

6 Otto R., 716. A. D. 1871. Opinion by Justice Swayne.

"The principle of estoppel *in pais* is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that *he who has been silent as to his alleged rights when he ought in good faith to have spoken*, shall not be heard to speak when he ought to be silent."

This was in a case when Morgan had stood by and seen a railroad company for years use his ground as a depot without objection.

We might pursue this principle indefinitely, but the record is teeming with proofs of not only passive acquiescence but active co-operation by these bondholders in getting the settlement between the railroad companies and the State effected, and, outside of the question as to whether the bondholders have, or ever had, any interest in the lien, we insist that the question of practical construction and estoppel by acts and by acquiescence through a long series of years deprives them of any active relief at the hands of this Honorable Court, and that the decree below should be affirmed with costs.

D. H. POSTON AND
W. K. POSTON,
Of Counsel for E. T., Va. & Ga. and M. & C. R. R. Cos.

5
No. 42

114-663

Supreme Court of the United States

No. 42.

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY AND PETER GEDDES, on behalf of the holders of Internal Improvement Bonds of the State of Tennessee, issued to the Memphis & Charleston Railroad Company, APPELLANTS,

vs.

THE MEMPHIS & CHARLESTON RAILROAD COMPANY AND THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY, Lessee, APPELLEES.

BRIEF OF L. W. HUMES,

OF COUNSEL FOR MEMPHIS & CHARLESTON R. R. CO. ET AL.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

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BRIEF OF L. W. HUMES,

Of Counsel for the M. & C. R. R. Co. et al.

STATEMENT.

Appeal from the Circuit Court for the Western District of Tennessee.

These Tennessee railroad bond cases may be divided into two classes—the foreclosed or sold, and non-foreclosed or unsold roads. This is the case of one of the non-foreclosed or unsold roads.

The bill is filed by the appellants, as holders of the coupon bonds of the State of Tennessee, payable to bearer, which were loaned to the Memphis and Charleston Rail-

road Company by the State of Tennessee, under the general internal improvement act of February 11, 1852.

Acts of 1851–2, ch. 151, p. 204, and amendments.

The claim of the bill is that these State coupon bonds, payable to bearer, are the primary obligations of the Memphis and Charleston Railroad Company directly to the holders, under the provisions of said act, and the State only secondarily liable, as surety.

And that the act, under which the bonds were issued, as matter of law and contract, created a lien and trust on the property of the company in favor of the holders of said bonds for the protection and to secure the payment of said bonds to the holders, with the State as trustee.

The position taken by the appellees is, that the coupon bonds of the State, payable to bearer, are no obligations of the company at all.

That the lien belongs to the State alone, with the entire interest in and absolute control over the same, for the sole purpose of indemnity to the State for the re-payment to her of the amount loaned to the company.

BRIEF.

The question in the case is, has the holder of the coupon bonds of the State of Tennessee, payable to bearer, loaned to the Memphis and Charleston Railroad Company under the act and amendments, any lien on the property of the company for the payment of his bonds?

We shall endeavor to show from the bonds, the acts, and on principle and authority, that he has not.

I.

CONSTRUCTION OF THE STATUTE.

Appellants say that notwithstanding the form of the contract, the company is in fact the principal debtor, and the State its surety.

But it may be well to remember that,

"Where parties have entered into *written engagements* with *express stipulations*, it is manifestly not desirable to extend them *by any implications*. The presumption is that, having *expressed some*, they *expressed all* the *conditions* by which they *intended* to be *bound* under that *instrument*. * * * And it is one thing for the court to *effectuate* the *intention* of the parties to the extent to which they may have even imperfectly *expressed* themselves, and another to *add* to the instruments all such covenants as, upon a full consideration, the court may deem fitting for completing the intention of the parties, but which *they*, either *purposely* or *unintentionally*, have omitted. The former is but the

application of a rule of construction to that *which is written*; the latter adds to the *obligation* by which the parties have *bound themselves*, and is of course quite *unauthorized*, as well as liable to great practical injustice in its application."

Asfidin v. Austin, 5 Adolph & E. (N. S.) 671.

This idea is again sharply put in a celebrated will case. There the court say:

"In a word, we are called upon to *demolish* the *fabric* which the *testator built*, and upon its *ruins erect another so dissimilar* in its *structure* that if it were permitted to him to revisit this world and *see it*, *he* would *fail* to *recognize* in it the *work of his own hand*. This courts cannot and will not do. It was for the *testator to speak*. *This court* is *not permitted to speak for him; it was for him to declare his wishes; the duty of the court is to give effect to those wishes*, if consistent with the rules of law."

St. Armour v. Revard et al., 2 Mich. 306.

Let us look, then, for an instant at the bond and coupon. They are in writing and will surely furnish some aid in construing the statute under which they issued. What they should be, their terms, the parties and conditions to them, this statute provides; and if this be so, they should in part, at least, reflect the interpretation of that statute. They are the instruments created by the act, and if so, they should in some degree point out its meaning.

See copies of the bond and coupon, record pp. 554, 555 and 556.

The bond is a simple coupon bond of the State of Tennessee for $1000, payable to blank or order. The faith of the State of Tennessee is alone pledged for its payment,

both principal and interest. And it recites that it is issued in pursuance and under the provisions of an act of the General Assembly of said State, passed at its session of 1851–2.

The State of Tennessee is the sole maker of the bond. The company is no party to it whatever.

The coupon is for $30. It says:

"The treasurer of the State of Tennessee will pay the bearer, in the city of New York, on the 1st day of January, 1876, being semi-annual interest then falling due on bond No. 357. ARTHUR R. CROZIER, *Comptroller.*"

Now, it is on these instruments in writing, with the State as sole maker and the company no party to them at all, that we are told the company is principal debtor and the maker, the State, surety.

The strange position is taken that a party is bound as principal debtor on an indorsement in writing, the obligations of which are expressed and to which he is no party, endorser, surety or guarantor.

Under ordinary circumstances such a proposition would not be considered, but in this case it is insisted we should do so seriously.

And very strange, too, it seems, if a written bond was to be made, upon which the company should be primary debtor and the State only secondarily liable as surety, that it should be drawn with the State as sole maker, and the company no party to it at all, and this by intelligent men.

And, say our adversaries, the bond refers to the acts of 1851–2 of the Legislature.

Does that help it?

Five other acts, besides the one aiding railroads and issuing bonds, are in the Acts of 1851–2; one $250,000 for the capitol; one $600,000 in renewal of old State bonds; one for $25,000 to aid the Dyersburg Turnpike Co.; one for $300,000 to aid in building bridges on the East Tennessee and Virginia Railroad, and one for $100,000 to aid the East Tennessee and Georgia Railroad to build a bridge—in all, $1,275,000—and the Railroad Aid Act, issuing bonds to fifteen companies at $8000 a mile. All issued from the same plate, and in the same series of numbering.

Gaines' Dep. p. 781. Bell's Dep. p. 767.
Powell's Dep. p. 693.

How can you trace such a bond? Where is your mark or indicia to show it is a railroad bond?

But, say our adversaries, the act of February 21, 1852, provided for identification of bonds by means of public records.

Section 8 provides, that "the Governor shall have engraved the bonds, which may be issued under the acts of the present General Assembly, *as a loan made to internal improvement companies.*"

"As a *loan.*" Mark this.

Section 9 provides, that "upon delivering said bonds to the company authorized to receive the same, the Secretary of State shall take a receipt, reciting the number, date and amount of said bonds, in a well bound book, to be deposited in his office," etc.

It has always been the custom of the State of Tennessee to keep a record of the numbers and particulars of all the bonds issued by it for whatever purpose, and the provision

made by law for such record in respect of the bonds issued under that act, merely placed those bonds, in this respect, upon the like footing with the bonds issued by the State for its own purposes, resting solely upon its faith and credit, and in respect of which there could be no pretence of the existence of any lien whatever in favor of any one upon any thing.

The record shows that this plan is adopted by the State or institution issuing bonds simply for the purpose of detecting spurious or over issue.

See Tate's dep., R. p. 453.

And besides, this second class of bonds, $600,000, for renewals, were bonds purely for State purposes. They were issued under the act of February 21, 1852, ch. 153, and the 4th section provides for the same kind of receipt to be taken by the Secretary of State. Surely there was no purpose or reason for doing this with them if tracing was the object, and the same kind of receipt for all the bonds issued by the State—the $250,000 for the capitol and the $25,000 for the Turnpike Company.

And further, if there was any purpose or object in identifying them, these six acts show the Legislature knew what identification was and how to identify them.

These renewal $600,000 bonds were printed "*Renewal.*"

If there had been any purpose or intention to identify or trace these railroad bonds, why not adopt their own plan and print them "*Blank Railroad Bonds?*" This is identification. Then why was not this done? Because there were no railroad bonds. They were all straight State bonds.

The State was bound to pay them and then look to the companies to pay her.

They were all coupon bonds of the State of Tennessee, payable to bearer, and without any possible way to distinguish them the one from the other. Now, then, here is the bond itself over which there is so much controversy. It is this which is offered and sold in the markets of the world. It speaks for itself. The purchaser sees what he buys, and there is not one single thing about it which points to or indicates that the Memphis & Charleston Railroad Company ever had anything to do with it whatever.

Our view is, that under the borrowing and sale of the bonds as above, they would pass from the borrower, according to Mr. O'Connor's beautiful simile, like the globules of water successively flowing through the Mississippi or Hudson river, and leave no trace behind.

Let us look now to the act.

The first section provides that good and solvent subscriptions to its capital stock, satisfactory to the Governor, sufficient to prepare the whole main trunk line for the iron rails, shall be obtained.

On a section of the road of thirty miles being prepared, with notice to the Governor, and that section, or any part thereof, is not subject to any lien whatever, other than those created in favor of the State by the acts of 1851–2.

Then said Governor shall issue to said company coupon bonds of the State of Tennessee, to an amount not exceeding $8000 per mile on said section, and bearing an interest of six per centum per annum, payable semi-annually, and not having more than forty nor less than thirty years to mature.

By this section, "*coupon bonds of the State of Tennessee*" are to be issued to the *railroad company.*

Our position is, that this section created two debts, one the debt of the State to the holder or bearer of her coupon bonds, for the payment of which the faith and credit of the State were alone pledged.

The other, a debt from the railroad company to the State of Tennessee for the loan of these bonds.

And the company was made the borrower of these bonds and the State the lender, and by this lending by the State and borrowing by the company, the company became the debtor of the State for the payment to the State of the amount of said loan. No possible connection between the two. Both two entirely separate and distinct debts, between entirely different persons. In one, the State, the debtor, and bound to pay the holder her bond. In the other, the company, equally bound to the State to pay her its debt for the loan of the bonds.

So that certainly in this section there is nothing to even indicate the slightest obligation by the company to pay to the holder the bonds of the State of Tennessee. And the act, like the bond, makes the State sole obligor. And the company is not made a party to it at all. And as to the lien, let's mark that as we go along. This provision is,

"And that section, or any part thereof, is not subject to any lien whatever, other than those created in favor of the *State* by the acts of 1851–2."

Sec. 2 provides that the bonds shall not be used for any other purpose than for procuring iron rails, &c., * * and the Governor shall have power to appoint a com-

missioner to act, under oath, in conjunction with said President, in negotiating said bonds for the purposes aforesaid.

"The bonds shall not be used for any other purpose." And "in *negotiating* said bonds," we submit that it is quite obvious the word "bonds," when used in the clause, "The bonds shall not be used," &c., and when taken in connection with the clause "in negotiating said bonds," means the proceeds of the bonds.

Sec. 3. "So soon as the bonds of the State shall have been issued for the first section of the road as aforesaid they shall constitute a lien upon the property of the railroad company," * * * "and the State of Tennessee, upon the issuance of said bonds and by virtue of the same, shall be *invested* with said *lien or mortgage* without a deed for the payment by said company of said bonds with the interest thereon as the same becomes due."

Our construction of this section is, that by the issuance of said bonds a lien is created and vested in the State for the payment to the State of said bonds. That the lien is the lien alone of the State, and given to the State alone for the payment by the company to the State of its debt.

"For the payment by said company of said bonds with interest." We interpret this to mean payment of the amount in money to the State. When considered in connection with the subject matter as a State bond it is easy to understand.

The interpretation attempted to be given by adversary counsel is a forced one.

They attempt to give the literal meaning to the words, when the proper way to construe a statute is to consider it all together.

Now, this act creates coupon bonds payable to bearer, made by the State, and lends them to the company. It creates a lien on the property of the company and vests it in the State, and, as will be seen further on, requires payment for the loan of these bonds and interest to the State, and gives a remedy in case of default, and that to the State, and finally retains the right to deal with the debt as it chooses, and that right is reserved to the State, so that, if we consider what we are dealing with, it is scarcely possible for us to get it mixed if we try.

This very question, too, has been settled by this court in U. S. v. Union Pacific R. R. Co., 91 U. S., 72. Under an act of Congress bonds of the government were loaned to the company. Section 6 of that act declares "*said company shall pay said bonds at maturity.*"

"To allow the government to *retain* the compensation due the railroad company for services rendered, and *apply the same to the payment of the bonds and interest until the whole is fully paid.*"

"To pay over to the government after the road shall have been fully completed, five per cent. of the net earnings of the road, to be appropriated *to the payment of the bonds and interest.*"

The court say:

"If the language used is taken in its natural and obvious sense, there can be no difficulty in arriving at the meaning of the condition 'to pay said bonds at maturity.' * * * The *bonds in question were bonds of the United States, promis-*

ing to pay to the holder of them one thousand dollars, thirty years after date, and the interest every six months. This obligation the Government was bound to perform."

This section contains the same language that our adversaries so strongly insist is objectionable in our act.

The court say this sixth section imposes on the company the obligation to reimburse the United States, principal and interest, and not any duty on the company to pay the interest or principal either. The court construes the obligations of the company to be to the Government, and not to the bondholder.

Yet our friends say this is the language which makes the company primarily liable to pay the bondholders, and fixes a lien on the company's property to secure the bonds, interest and principal, to the holders.

Sec. 4. When the company shall have prepared, as aforesaid, a second section or any additional number of sections of twenty miles each of said road, the Governor shall in like manner "issue to said company like bonds of the State of Tennessee, to an equal amount with that before issued under the first section of the act for each and every section of twenty miles, * * * and upon the issuance of said bonds, the State of Tennessee shall be *invested* with a like mortgage or lien without a deed, &c., upon said stock and upon said *first* and *additional* section or sections of said road, etc., for the payment of said bonds and the accruing interest thereon. * * * * And when the whole of said road shall be completed, the State of Tennessee shall be invested with a lien, without a deed, &c., upon the entire road, &c., for the payment

of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds.

"And after the Governor shall have issued bonds for the first section of the road, it shall not be lawful for the said company to give * * * to any person whatever * * * any lien * * * of any kind which shall have priority *over* or come in conflict with *the lien of the State herein secured;* and any such lien, incumbrance or mortgage shall be null as against the State, which shall have *priority* over all other claims existing, or to exist against said company."

The "polar star" of legislative interpretation must be the intention. To construe an act by any other measure would indeed be to "keep the word of promise to the ear and break it to the hope." Of course the entire act must be considered in giving it a construction. And if one part is ambiguous the others may be looked to to explain the doubtful clause or sentence. These are elementary propositions of law and need no authorities to sustain them.

If there is any ambiguity or doubt about the true meaning or construction to be given the first section of the act, the second may well be considered as an interpretation by the Legislature of what it meant by the first section.

In this 4th section we find it clear that the coupon bonds of the State of Tennessee are still the ones to be issued. The most that can be said of our adversaries' position as to the 3rd section, is that the bonds there issued are a lien only on the first section of the road. The 4th section comes to our aid in this, and says:

"And upon the *issuance* of said bonds the State of Tennessee shall be *invested* with a like mortgage and lien

without a deed, &c., upon said *first* and additional section or sections of said road, &c., for the payment of said bonds and the accruing interest thereon."

Our construction of the 3rd section is, that it is the issuance of the bonds that constitutes, that is, creates the lien, and vests it is in the State of Tennessee, that is, makes it the lien of the State of Tennessee.

And further on, as this 4th section says:

"And when the *whole* of said road shall be completed the *State* of *Tennessee* shall be *invested* with a *lien* without a deed upon the *entire road* for the payment of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds."

Is there anything we can add to this language?

The issuance of the bonds shall create the lien.

That lien is the lien of the State of Tennessee.

The State of Tennessee shall have a lien upon the entire road.

And there shall be no lien which shall have priority over it.

Sec. 5 provides that the company shall deposit in the Bank of Tennessee, at Nashville, fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, including exchange and commissions, or satisfactory evidence that said interest has been paid or provided for; and if the company fail to deposit said interest or furnish the evidence, the Comptroller must report this to the Governor, and the Governor shall immediately appoint some suitable person to take possession of the

road and to receive the rents and to give bond to the State of Tennessee and pay over same, under direction of the Governor, toward liquidation of said unpaid interest. And if the company refuse to deliver up said road to the person appointed, the Governor shall issue his warrant to the sheriff, commanding him to take and place said receiver in possession, and the receiver shall continue in possession until a sufficient sum be realized, exclusive of the costs and expenses, to pay the interest due on said bonds, which being done, he shall surrender said road to said company. The comptroller is authorized, and it is his duty, upon his warrant to draw from the treasury any sum of money necessary to meet the interest on such bonds as may not be provided for by the company, as provided for in this act, and the comptroller shall make report thereof to the General Assembly from time to time.

This is the first section providing for any payment on the bonds, namely, the interest.

And it says the company shall deposit—pay said interest to the State of Tennessee, that is the Bank of Tennessee, its fiscal agent.

The Bank of Tennessee was the treasury of the State. The act creating it says, "in the name and for the benefit of the State of Tennessee alone," * * * "and the faith and credit of the State are pledged for its support." Its capital was provided by the State alone.

"An act to establish a State bank, to raise a fund for internal improvements," it is entitled. Its income was to go to the State alone. It received and distributed the revenues of the State under the laws of the State. Its officers

were the officers of the State, subject to its control, and to a peculiar liability.

This word "deposit" we contend means payment, as here used, because when the company so put the money in the State treasury it was a satisfaction of that amount of interest due at the time. The company had no concern in seeing it go to pay interest coupons. They were the obligations of the State with which the company had nothing to do. The money went into the general funds of the State treasury, and the State used them for its ordinary purposes with as much freedom as the State exercised in disbursing its revenues from any and all sources.

Another reason found on the face of the section, we think, shows this construction is true: "or satisfactory evidence that said interest has been paid or provided for."

The company shall deposit it in the Bank of Tennessee or show satisfactory evidence it has been paid.

And this is the evidence of the fact that the State treated the debt of the company as due solely and alone to it—the State.

For if the company is the primary debtor and the State secondarily liable as surety or guarantor, does the surety or guarantor ever require the principal to pay to him, the surety, the interest on the debt?

If he requires the interest to be paid in any such manner at all, is it not to the creditor?

Then, this shows the State acted and considered herself the sole creditor of the company.

And further, this interest must be paid to the State

fifteen days before the debt from the State to the bondholder is due.

If these bonds were the debts of the company to the holder, what concern was it to the State when this interest was paid?

If it was due from the company to the holder, why was it not provided that it be paid by the company to the holder, instead of to the State and by her to the holder?

And, further, it is made the duty of the Comptroller, upon his warrant, to draw from the treasury *any sum* of money necessary to meet the interest on such bonds as may not be provided for by the company.

If this was not the debt of the State, why did she order this interest in any case to be paid out of her treasury?

This fifth section, too, provides remedies in case the company fails to pay its interest.

To whom are these remedies granted?

To the State of Tennessee.

If the bondholder was the creditor of the company, would not the remedy be granted to him?

And this remedy arises when at the time the company fails to deposit the amount to meet the interest fifteen days before it matures.

Is this not treating it as an absolute payment?

In case of default, a remedy is at once given.

Says the section:

"The Governor shall *immediately* appoint a receiver, who shall give bond." To who?

"The State of Tennessee."

And the last provision of the section, if the company fails to provide for the interest, it is made the duty of the comptroller, upon his warrant to draw from the treasury *any sum* of *money necessary* to meet the interest on such bonds, and leaves the State by its receiver to run the road and get back its money thus paid out.

No receiver for the bondholder against the road. No remedy in favor of the bondholder against the road.

But the remedy given alone to the State, and the receiver the receiver alone of the State by the appointment of its executive officer.

None can fail to notice the peculiar kind of remedy given in this section, in case the company do not pay the interest to the State. Here, then, is a coupon bond of the State of Tennessee, payable to bearer, the faith and credit of the State alone pledged for its payment.

Here is an act issuing coupon bonds. Their issuance creating a lien. That lien the lien of the State of Tennessee. Interest must be paid, and to the State, and in case of failure a remedy is given and that to the State.

And yet we are told this is all for the benefit of the bondholder.

Is it not the simple truth that no liability was ever dreamed of until this suit was brought?

It does seem to us that the language of this section leaves no doubt that the purpose of the Legislature was that the company should pay to the State, its creditor, the interest due by the company to the State, fifteen days before the

interest from the State to its bondholder was due, and that the payment to the bondholder of his interest should be made by the State, his sole debtor. How can there be any mistake about this when it is so expressed in the plainest language?

Section 6 provides "that if said company shall fail to pay any of said bonds when they fall due, the Governor shall cause to be filed a bill against said company in the name of the State of Tennessee, and the court shall make such decrees as are necessary to recover the payment of said bonds, with interest thereon, and *to indemnify the State of Tennessee against any loss on account of the issuance of said bonds*, by ordering a receiver or sale of said road, or in such other manner as may be *deemed best for the interest of the State.*

The first clause of this section, i. e., "That if the company fail to pay any of said bonds when they fall due, the Governor shall," &c., is much relied on by opposing counsel as being strongly in their favor.

When considered it is rather remarkable how strong this clause is in their favor, as the remedy given for the failure to pay said bonds immediately following is given to the State, not in trust or for the benefit of another, but absolutely for her alone.

This position of opposing counsel is certainly a very striking illustration of the old adage, that a drowning man will catch at a straw, and very forcibly shows to what straits they are driven to in this cause, when they take a case of default, and the remedy therefor given absolutely to another, as illustrative of the correctness of their posi-

tion, and which, in fact, is in exact conformity with our view.

Here is a remedy in case the company fails to meet the bonds. It, too, is for the State: A bill in the name of the State against the company for a decree to *indemnify* the *State* against any loss by the appointment of a receiver or by a *sale* of the road, or as deemed best for the interest of the State.

By a sale of the road.

If this lien was created for the bondholder, or for his benefit, the State would not and could not, as she directs to be done, make absolute disposition of the road.

But the lien was treated, considered and understood all along to be the absolute property of the State alone.

Some remedy would have been provided for the bondholder as to the payment of interest and principal both against the company, if the debt of the bondholder was at all the debt of the company.

Sec. 7 provides that the company at the end of five years after the completion of said road, shall set apart one percentum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the treasury of the State, &c., and for which the Governor shall give said company a receipt, and as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to the company; and bonds so paid in and interest accruing thereon, from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the

company, and should said company re-purchase any of the bonds issued to it under the provisions of this act, they should be directed as aforesaid, and cancelled, and the remedy of the 5th section is given in case of failure.

This is the first section in the act requiring payment by the company. It fixes the time five years from its completion. To the State in bonds of the State.

This shows from the mode of disposition by the State of the debt to it from the company that it was the debt alone of the State.

It is a mode of absolute discharge of the debt from the company to the State, provided by the State.

And here is the remedy again in case of default, and it is in favor of *the State*. This is an annual payment on the principal of the debt to the State, made in its own bonds.

The words "as between the State and said company, the bonds shall be a credit," &c., mean, that though such payment shall be a credit on the debt due to the State from the company, yet it shall not affect the debt due on the bonds by the State to the bondholders, i. e., the particular bonds which were loaned to said railroad.

Beyond question it was an absolute payment to the State. This is shown from the manner of making it, and the character of the thing paid.

This position is without doubt when we consider the payments required by this section could be in any State bonds.

It is to the State alone that the lien on the company's property is given. Then payment by the company to the State must discharge the debt and extinguish the lien.

This section, too, shows that "for the payment of said bonds" means payment to the State.

A calculation of the one per cent. sinking fund will show that before the maturity of the bonds it would liquidate the whole debt due to the State, and leave the State bound to pay the bonds to the holders purely as its own debt, without any right to call on the company for any further reimbursement.

Here is a plan prescribed by which the entire debt may be paid before a bond is due.

Would this absolute disposition of the debt be undertaken unless the debt of the company was that of the State alone?

From this entire transaction, it does seem to us that step by step it shows that the railroad company had nothing to do with the bonds of the State of Tennessee.

And that no one had anything to do with the debt of the company but the State alone.

For here is the bond, on its face nothing in the world but the promise of the State to pay to bearer, and its faith alone pledged for that.

Sec. 1 says, "issue a bond of the State."

Secs. 3 and 4 give a lien to the State.

Section 5 says, "pay the interest to the State," and in default gives a remedy to the State.

Section 6, in default of payment of the bonds, gives a remedy to the State.

Section 7 provides for a sinking fund to the State.

It seems to us that there can be no question about the bond being the liability of the State alone, and the debt from the company belonging to the State alone.

We do not see how there can be any doubt about it from the foregoing, but if there is, it certainly looks to us as though the 12th section would put all doubt at rest. It provides:

"That the State of Tennessee expressly reserves the right to enact by the Legislature hereafter, all such laws as may be deemed necessary to protect the interests of the State.""

Here is retained by the State the right absolutely to wipe out this debt. Would such a thing be done except where the debt was the debt of the State alone? Can there be any purpose of trust for the benefit of bondholders in a lien created, where the right absolutely to extinguish that lien is given to the State?

And this 12th section shows the Legislature knew what rights were and how to reserve them, where there are any, for they do so.

"But in such manner as not to impair the vested rights of the stockholders of the companies."

Now if this act had created any rights in favor of the bondholders, or intended to do so, the Legislature would have known and reserved them.

Future legislation was to protect the State. No interests of the bondholders, no protection, no security, is given them. Had they had any, it would have been protected.

Sec. 13 provides that if a company fraudulently obtain the bonds, a suit shall be brought in the name of the State against the company, and the court is to decree a sale of the road, and the proceeds are to be paid into the treasury, to be used as a sinking fund to meet the debt of the State.

This shows how the State treated the debt from the company. It was simply a debt for so much money loaned the company.

And this section shows it, because here the State on such an act of bad faith declares the whole debt due, and has the road sold before a single bond or coupon of the State is due.

Two other acts passed by this Legislature at the same session as the one above, we think throw light on its proper construction. One, ch. 72, January 15, 1852, p. 76, granting a loan of $300,000 of State bonds to the East Tennessee & Virginia Railroad Company, to aid in building bridges; and the other, ch. 89, February 4, 1852, granting a loan of $100,000 of bonds to the East Tennessee & Georgia Railroad Company, to aid in building a bridge across the Tennessee River at Blair's Ferry.

These acts are very much like the one just presented.

In ch. 72, the same bonds are issued, and a lien is vested in the State to secure them.

Sec. 3 provides:

"So soon as the bonds are issued * * * *the said bonds shall, on the issuance* thereof, *constitute a lien upon* all * * * the property of the company * * * * * for

the payment of said bonds and interest accruing thereon. * * * And all liens created by the company shall be void as to the liens of the State of Tennessee hereby created for the payment of the bonds issued under the provisions of this act, and accruing interest thereon.

Sec. 4 reserves the right to enact any law to protect the State and to provide for the *more speedy and certain payment* by the company of said bonds and interest.

Sec. 6 provides that the company must deposit in the Bank of Tennessee, fifteen days before the interest is due, an amount to meet it, or satisfactory evidence that it has been paid or provided for, and in case of default the same remedy is given as in the other act, and so with the bonds, and so with the sinking fund, and in case of a sale.

Ch. 89, p. 110, provides of the same bonds.

Sec. 2 provides that for the purpose of enabling the said company to raise a fund for the payment of the interest on said bonds, and also to pay the principal thereof, at or before maturity, the said company is authorized and required to demand and receive from all passengers crossing said bridge in said railroad cars, in addition to the regular charges, the further sum of ten cents on each passenger as bridge toll, and it shall be the duty of said company to collect the said sum at the same time the regular passenger money is collected, and to render a monthly account thereof, and pay over monthly the said sum in some bank at Knoxville, taking the receipt of the bank therefor, and the sum so deposited in bank shall at all times be subject to the check of the Comptroller of the Treasury for the payment of interest on said bonds, and any overplus after the payment of said interest shall be passed to the credit

of the company in discharge of the principal due on any one or more of said bonds. Provided, that as soon as the interest and principal of said bonds shall be paid the said company shall be released from the exaction of said additional charge.

Two things, we submit, are shown by this section.

1st. That monthly payments of the interest are to be made, and

2nd. That by these monthly payments the principal, too, will be paid to the State long before her bonds are due.

Sec. 3 vests the title to the entire road in the State to secure it.

Counsel for appellants insist that but for the 8th and 9th sections of the act, ch. 153, of February 21, 1852, requiring the bonds to be numbered, they could not have enforced their supposed rights for want of means and indicia to trace them to the companies to which they were issued.

And there is nothing to tell the bonds of one company from another; and, now, here are these bridge bonds. They must be numbered, too, but there is nothing by which you can distinguish them from a railroad or any other bond.

Sec. 14 shows the State contemplated that it might have to sell some of the roads, one other fact to be noticed before we leave this act.

Prior to the passage of this act, as far back as 1834, the State of Tennessee had adopted a plan of internal im-

provements, that was for the State to endorse the bonds of the railroad company.

This plan had been tried and had proved a failure.

Why?

Because the State was then in the finest credit. Straight State bonds sold above par.

The railroads were untried ventures.

There was no way to distinguish the good roads from the poor ones, for even at that date some of them had failed and been sold out, while others were languishing for want of means, and the endorsed railroad bonds brought less than the straight State bonds, for the simple reason that the purchaser saw he must exhaust the property of a doubtful debtor before he could call on the solvent surety. This being the case, the State decided to change her plan of internal improvements. It had been demonstrated by trying it that the bonds of the railroad as principal debtor sold for less than the bonds of the State alone.

And it had been determined, and the act of February 11, 1852, was the expression and embodiment of that determination, to change this plan of internal improvements, and to issue the bonds of the State of Tennessee alone, and to make whatever debt there was from the railroad company to the State alone.

The 12th section of the act expressly reserves to the State of Tennessee the right to enact by the Legislature thereof, hereafter, all such laws as may be deemed necessary; and mark how the State from that time on exercised this right.

Sec. 1 provided that the Governor should issue to said company coupon bonds of the State of Tennessee.

$8000 a mile.

The act of February 8, 1854, changed this to $10,000 a mile.

Sec. 8 says the bonds issued under the provisions of this act shall *in no case be sold at less than par.*

The act of February 17, 1854, sec. 5, changed the number of miles of each section, as fixed by sec. 4 of act of February 11, 1852, from twenty to ten miles.

The other acts required the sections to be completed.

The act of January 19, 1855, sec. 3, says after they are graded.

Sec. 7 of act of February 11, 1851–2, provided for a one per cent sinking fund.

Act of February 21, 1856, sec. 5, increased the sinking fund to two per cent.

And sec. 6 gave the *State* the same remedy in case of failure.

Act of March 20, 1860, ch. 93, p. 297, sec. 1, provides that the money and bonds paid in as a sinking fund "*shall be passed directly to the credit* of the party having so paid the same, *and be a release to said party for that amount on the debt due by them to the State of Tennessee.*

Sec. 2. "Said bonds shall all be cancelled."

Sec. 3 increases the sinking fund to 2½ per cent.

Sec. 7 of act of February 11, 1851–2, provided that said sinking fund could be paid in any bonds of the State.

Sec. 5 of this act says in cash or bonds of like character at their face or par value.

Sec. 6. If paid in money it shall be invested immediately in the bonds of the State, and they shall be cancelled.

Sec. 7. The sinking fund, when paid, in all cases shall be passed directly to the credit of said company or corporation, and be a release to said company or corporation for that amount due by them to the State. The commissioners shall issue a receipt to each company for such payment.

Sec. 8. Each railroad company is required to pay the interest on the bonds unpaid, and not on the original amount.

This act is important because of the fact that it was passed before the war, when the State's credit was good. It shows how the State construed this contract with the company.

Act of February 1, 1861, ch. 10, p. 25, suspended the sinking fund one year.

During the war the State failed to pay any of its interest coupons on all her bonds up to January, 1866. The amount of these overdue coupons was $4,000,000.

Act of Nov. 23, 1865, ch. 9, p. 10.

An Act to Amend an Act entitled "An Act to establish a System of Internal Improvement in the State, passed Feb. 11, 1852."

Sec. 1 provided that the Governor of this State issue six per cent. coupon bonds of the State, similar in character in every respect to those issued under the act that this

is intended to amend, and maturing at the same time, to an amount sufficient to pay off all the bonds and interest past due, &c.

Sec. 2. The bonds shall be dated January 1, 1866, and payable January 1, 1892.

Sec. 3. Said bonds shall in no event be sold, exchanged or negotiated at less than their par value, but they may be exchanged for the interest coupon bonds hereby provided to be paid, estimating each at their par value.

Sec. 4. The amount of interest now due or that may become due by January 1, 1866, by any railroad company to the State, on bonds issued to or endorsed for said company, shall be charged up to said company, on the same terms and conditions of the original loan under the law this is intended to amend, and the State shall have the liens upon each of said roads * * for the payment of principal and interest of the bonds * * to be issued to pay the interest on bonds said company should have paid interest on, &c.

Sec. 5. The railroad companies receiving aid under this act shall pay the interest on said bonds as it matures in same manner, * * * * as they are now required to pay on the bonds issued or endorsed for them under the act this is intended to amend, commencing the payment of said interest on the 15th day of June, 1866.

Sec. 6 suspends the "2½ per cent. per annum sinking fund until January 1, 1867," and said companies are relieved from the payment of the sinking fund now past due under said law.

Sec. 7 makes the sinking fund 4 per cent., to begin in

1867, to be paid in the bonds of the State in like character to those issued or endorsed for said company, said payments to be made semi-annually on the first of April and October.

Sec. 8. The bonds must be negotiated and the proceeds of the same applied to the payment of the interest now due, or to fall due January 1, 1866, on all bonds issued or endorsed by the State, hereinbefore provided, or exchange said bonds with the holders of said coupons, so as to pay and liquidate said interest.

This act provides for the payment of *all the bonds* and interest past due, and that overdue interest owing by a company "*to be charged up to the company as part of the original loan with the same lien*," and they are to pay the interest on it in the same manner. And Gaines proves that the overdue interest of each company was, under this act, charged up to it as part of the principal.

One further significant fact is proved by this act, i. e., that the holders funded their past due coupons into new bonds without preserving the identity between the new bonds and the coupons with the bonds issued to the particular railroad company.

Act of February 18, 1867, suspended sinking fund payments again until 1870.

See also as to other loans act of December 7, 1867.

Act of February 29, 1869, sec. 1, allows the railroad to pay its debt in any State bonds at any time.

Sec. 2. And the company may issue bonds of its own with like lien.

Act of January 2, 1870, sec. 1. Any payment, to the extent made, shall be a full and perfect discharge of the lien which the State holds upon the property of such company.

Act of March, 17, 1873. After the State defaulted, again this act to fund the past due bonds and coupons was passed.

Under this act all the past due bonds and coupons were funded, and all the bonds were registered.

Our position is, that knowing they were taking a new security, resting alone on the faith of the State, they accepted it, and recognized the claim of the State, that the debt of the companies was hers alone, to dispose of as she chose. But we are not at a loss as to how the courts construe such statutes, because they have been often passed on.

Chamberlain v. St. Paul and Sioux City R. R. Co. et al., 92 U. S. 299.

I cite this case first, because it is so like ours. The statement of the case is this:

"The plaintiff is the holder of $5000 of bonds of the State of Minnesota, and seeks to charge certain lands in the possession of the defendant railroad company with their payment. The bonds were issued in 1859 to the Southern Minnesota Railroad Company, under the authority of the constitutional amendment of April, 1858. That company was one of the four companies to which the Territory of Minnesota granted the lands obtained by the act of Congress, of March 3, of that year. The grant of the State was made in express terms, subject to the provisions of the act of Congress, and would have been

thus subject, without any declaration to that effect. The act of Congress only authorized a sale of 120 sections for each road in advance of its construction. Any further disposition of the land along either road was allowed only as the road was completed, in divisions of twenty miles.

* * * * * * * * *

Minnesota became a State in October, 1857. Its constitution prohibited the loan of the State credit in aid of any corporation, but by an amendment removed this so far as the four companies in aid of which the Congressional grant was made.

"The amendment provided, 1st, for the issue of bonds of the State to the railroad companies. 2nd, for taking from them security for the payment of the interest, and against loss on the bonds thus issued; and, 3rd, for a forfeiture of the lands and franchises of the companies, in case certain portions of their respective roads were not completed within prescribed periods. * * *

"1st. The bonds were to be issued to each of the four companies, bearing interest at the rate of 7 per cent. per annum, payable semi-annually in the city of New York, to an amount not exceeding $1,250,000, in instalments of $100,000, as often as ten miles of its road were ready, and an additional instalment of the same amount as often as that number of miles of the road was fully completed and the cars were running thereon, until the whole amount authorized was issued. The bonds were to be denominated Minnesota State railroad bonds; they were to be signed by the Governor, countersigned and registered by the treasurer, and sealed with the seal of the State. They were to be issued in denominations not exceeding $1000, payable to the order of the company to whom issued, transferable

by indorsement of the President of the company and redeemable at any time after ten and before the expiration of twenty-five years from their date; and for the payment of their interest, and the redemption of their principal, the faith and credit of the State were pledged.

"2nd. The security to be taken for the payment of the interest on the bonds received by each company was to consist of an instrument pledging the net profits of its road, and the security against loss on its bonds was to consist of a conveyance to the State of the first 240 sections of land, free from prior incumbrances, * * * * and a transfer to the treasurer of the State of an amount of first mortgage bonds on the roads, lands and franchises of the company, corresponding in amount to the State bonds issued to it. The delivery of the first mortgage bonds necessarily implied the execution of a mortgage or deed of trust for their payment. In case either company made default in the payment of the interest or principal of the bonds issued to it by the Governor, no more State bonds were to be thereafter issued to that company; and the Governor was to proceed to sell, in such manner as might be prescribed by law, its bonds or the lands held in trust, or require a foreclosure of the mortgage executed by the company to secure its bonds.

"3rd. Each company which accepted the bonds of the State was required, as a condition thereof, to complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than 100 miles before the year 1864, and four-fifths of the entire length of its road before the year 1866; the amendment declared that any failure on the part of the company to complete the number of miles of its road in the manner and within the

several times thus prescribed, should forfeit to the State all the right, title, and interest of any kind whatever in and to any lands granted by the act of May 22, 1857, together with the franchises connected with the same, not pertaining to the portion of the road then constructed.

"The Southern Minnesota Railroad Company accepted the amendment, and executed the pledge of net profits, and the conveyance of the 240 sections required. It also excuted a deed of trust upon its roads and all its lands and franchises to secure its first mortgage bonds, to be transferred to the treasurer when State bonds were received. It then entered upon the construction of its roads, and contracted with the plaintiff to grade and prepare the roadbeds for the superstructure. During that and the following year, 1859, thirty-seven and one-half of one of the roads, and twenty miles of the other road, were thus graded by the plaintiff. As often as any ten miles of either of the roads were ready for the superstructure the Governor issued to the company bonds of the State to the amount of $100,000. Nearly all of these bonds, amounting to $500,000, were transferred to the plaintiff for his work in grading the roads, and are still held by him. They were indorsed by the President of the company, with a waiver of presentment, demand, and notice.

"An act of the Legislature, passed August 12, 1858, required the first mortgage bonds of the company to be transferred to the treasurer to be drawn so that the interest and principal should mature sixty days before the maturity of the interest and principal of the State bonds. * * * * The act also provided for the foreclosure of the mortgage or deed of trust, whenever default was made in the payment of either interest or principal.

"The company never completed any part of either of its roads, and did nothing more than the grading mentioned; and it made default in the interest maturing upon the State bonds and also in the payment of the interest accruing on its first mortgage bonds. The Governor thereupon proceeded under the above act and an act passed on March 6, 1860, and procured a foreclosure of the mortgage of the company; and the roads, lands, and franchises which it covered were sold pursuant to its provisions, and at the sale were purchased by the State. This purchase took place in October, 1860, and the necessary conveyances were made to the State. From that time until March 4, 1864, the State held the property, land and franchises, thus acquired. During this period, it made repeated efforts to induce other parties to undertake the enterprises and carry them to completion, but without success.

"On March 4, 1864, the Legislature passed an act by which two new companies were organized — one with the same name as the original company, the Southern Minnesota Railroad Company; and the other, by the name of the Minnesota Valley Railroad Company. The name of this latter company was afterwards changed to that of the St. Paul & Sioux City Railroad Company. To the companies thus organized the Legislature granted, subject to certain conditions, all the property rights and franchises of the original company, which the State had acquired, "free from all claims and liens;" those which appertained to one of the lines were granted to the new Southern Minnesota Railroad Company; those which appertained to the other line were granted to the Minnesota Valley Railroad Company, now the St. Paul & Sioux City Railroad Company. The Southern Minnesota Railroad Company had con-

structed and equipped 167 miles of its road, at an expenditure of $5,000,000, and the St. Paul & Sioux City Railroad Company had constructed and equipped 170 miles of its road, at an expenditure of $3,000,000.

"Upon the completion of ten miles of its road each company received from the Governor, pursuant to the provisions of the act, a deed in fee simple of 120 sections of land appertaining to its road, to which the State was entitled under the congressional grant, and the bonds of the original Minnesota company transferred to the treasurer of the State were cancelled.

"The bonds of the State remaining unpaid, the present suit was brought by the complainant to charge with their payment the lands mortgaged to secure the State against loss on them under the constitutional amendment of 1858."

Mr. Justice Field, delivering the opinion of the court, says:

"Pending the proceedings stated, the bonds of the State in the hands of complainant remained unpaid, and they are still unpaid. The faith of the State was pledged for the payment of both principal and interest. * * *

"The complainant under these circumstances finding no relief from the plighted faith of the State, and unable to pursue any remedies at law against her on her bonds, seeks to charge with their payment the 240 sections mortgaged by the original Southern Minnesota Railroad Company, under the constitutional amendment of 1858, and purchased by the State under the foreclosure of the mortgage and now held by the defendant railroad companies. The position of the complainant is, that notwithstanding the form of the contract, the original company was in fact the principal debtor, and the State its surety; and that, as

the creditor to be paid, he is entitled to have the securities taken by the State applied to the payment of the bonds held by him; that the 120 sections for each road which the company was authorized to construct, became its property by the act of May 22, 1857; that the subsequent interest of the State under the trust deed and mortgage was only the right to hold them as security against loss on its bonds; that this interest was not changed by the foreclosure of the mortgage and purchase of the State at the sale; and that the lands passed to the defendant railroad companies with notice that they were thus held by the State. * * * In this case the deed and mortgage to the State were not intended to create a trust in favor of the holders of her own bonds. The State was primarily liable to the bondholders; and it was only as between her and the company that the relation of principal and surety existed. It may be doubted whether the bondholders could call upon the company in any event. The indorsement made by the President simply transferred the bonds; it was not the act of the company. Be that as it may, whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, it was one resting in equity only. It was not any legal right arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a court of chancery against the surety. But the State being the surety here, it could not be enforced at all, and not being a specific lien upon the property, cannot be enforced against the State's grantees."

In this case, as in the one at bar, bonds of the State were issued to the railroad companies. Security was taken for

the payment of the interest, and against loss on the bonds. And forfeiture in case they fail to build in a certain time, as provided in sec. 20 of our act.

In this the bonds bore 7 per cent. payable semi-annually. In ours, 6.

To be issued in instalments of $100,000 for 10 miles. In our case by sections, and at $8000 and then $10,000 a mile.

In this the bonds were to be denominated "Minnesota State Railroad Bonds." In ours they were straight State bonds: nothing about them to show what kind of bonds they were.

In this case as in ours, $1000 bonds.

In this case payable to the order of the company to whom issued, transferable by indorsement of the President of the company. In ours, payable to bearer, indorsed by no one.

The faith and credit of the State are pledged in both for the payment of the principal and interest of the bonds.

In this, to secure the interest an instrument pledging the net profits was to be given by the road, and to secure the bonds a conveyance to the State of the first 240 sections of land free from prior incumbrances, and an amount of first mortgage bonds of the companies. In our case, the issuance of the bonds vested in the State a lien to secure them with interest.

In both, in case of default the State to sell.

In this the debt of the company to the State was to fall due 60 days before the debt of the State on her bonds. In ours, 30 days.

The most remarkable feature of this case is, we think, that they were issued as "Minnesota State Railroad Bonds," and indorsed by the President of the company, waiving demand, notice and protest.

And in this case the court hold—

The deed and mortgage were not *intended* to create a *trust* in favor of the holders of *her own* bonds.

The State was *primarily liable* to the *bondholders.*

And that the indorsement of the President operated only as a transfer of the bonds.

And the right of the plaintiff is only an equity.

It was not any *legal* right arising out of any positive *law* or any *agreement* of the parties.

It did *not create* any *lien* which *attached* to or *followed* the property.

But the State being the surety here, it *cannot be enforced at all*, and not being a *specific lien upon the property* cannot be enforced against the State's grantees.

The facts of our case are, we submit, stronger in our view than they were in this case.

This is the case on which the court below put its decision in our favor.

Stuart v. James River & Kan. Co., 24 Grat. (Va.) R. 297,

Is very much like the case at bar.

This was a suit on a bond of the State of Virginia for $15,000 against the James River & Kan. Co. Under an act of the Legislature $200,000 of registered bonds of the State of Virginia were issued to the James River & Kan. Co. These were issued on condition the company would give the State a bond for $400,000, obligating it to return

in a certain time like registered bonds in the amount loaned. Say the court:

"Does the act of March 1, 1867, upon which this action is founded, create a contract or liability on the part of the company for the benefit of the plaintiff? The court is of the opinion that it does not. * * *

"Was the provision made for the benefit of the bondholder? And was it desired to fix a direct liability on the company to him, which could be enforced by suit in his own name against the company, with whom and himself there was no privity of contract? Or was it designed to benefit the State, by calling in her $180,000 and extinguishing her liabilities to that amount? A compliance by the company with the terms proposed would give the holder of these bonds of the State an equal amount of other State bonds in their stead. If the company borrowed the money authorized by the act, it must be held to have consented to the terms upon which the act proposed to bestow that privilege, which was substantially to relieve the State from her liability for said debt. But it was a contract between the company and the State, to which the bondholders were not parties, and by which they were not bound. The State, by making such a contract with the company, could not release herself from her liability, if any, to the bondholders. And the court is of opinion that whilst the borrowing of the money by the company as authorized by the act, and would complete the contract, it only evidences a contract between the Commonwealth and the company to which the bondholders are strangers. And if the company has failed to comply with its terms, it is amenable only to the Commonwealth. There was no liability of the company to the holders of the bonds. They were purchased,

undoubtedly, upon the faith of the Commonwealth, and not upon that of the canal company. The holders, when they purchased, looked alone to the Commonwealth for payment, and not to the company. The credit of the company could not have entered into the consideration of the purchaser, and the holder had no right to look to the company for payment. There was no relation of debtor and creditor between the company and the bondholder. And the court is of opinion that the act aforesaid, prescribing terms to the company for the benefit of the State, upon which they could exercise a privilege, did not create the relation of debtor and creditor between the company and the bondholders, who were not parties to the transaction. The noncompliance of the company with the terms could hardly extinguish the relation of debtor and creditor between the company and the State, and create such relation between the company and the holder of the State bonds. The company having failed to fulfill the contract on which the privilege was granted, is amenable to the State, and not to strangers to the contract."

Murdock v. Woodson, 2 Dillon C. C. R. 196.

In 1851 and along to 1855 the Legislature of Missouri passed acts granting aid to railroad companies, the purpose being to complete the roads. The aid was given in this way: "The State made its bonds, promising to pay the amounts thereof to the company or its order, with coupons attached; and by the act the faith and credit of the State were pledged for the payment of the interest, and the redemption of the principal of the bonds. The company was by the act to make provision for the payment of the interest and principal of the bonds, so as to exonerate the

State. To secure this on the part of the company, the act provided that the net tolls and income of the road should be pledged for the payment of interest, and that the acceptance of the bonds by the company should be a mortgage on the road to secure the payment of the principal and interest of the sums of money for which such bonds shall be issued. This was the first lien."

Say the court:

"It is next urged that the statutory lien in favor of the State was reserved by it, not exclusively for its own indemnity, but for the benefit of the holders of its bonds; and therefore the State, holding the lien merely as trustee for its bondholders, could not release such lien while its bonds were outstanding, as they still are. * * * * I am inclined to think, however, that the form of the transaction indicates the intention of the parties.

"The State issued its bonds and these were negotiated and taken upon the State's 'faith and credit,' without any accompanying security. To indemnify itself, the State provided for and received a mortgage upon the road of the company, and a pledge of its net tolls and income. Then comes the further provision that the companies shall punctually pay the interest and principal of the bonds, but if they fail to do so, the State may sell the road to others, or buy it in itself, to be thereafter disposed of as the Legislature may direct.

"It could not be maintained, we think, that if a sale were made by the State to a third person, that he would take it subject to a lien in favor of the holders of the bonds of the State. Such a view seems to be inconsistent with the provisions of the act under which the aid was given, and the lien reserved to the State, * * * and with

the entire State legislation on the subject of disposing of roads purchased by the State under the lien reserved to it.

"The judges, in their answer to the Governor, distinctly say, that 'when the State becomes the purchaser of the railroad under the lien reserved, both the lien and the former company are extinguished. The State remains liable for her own bonds, and owns the railroad, and the State may sell it without reserving a lien for the whole indebtedness of the former company, but only for the unpaid balance of the purchase money.'"

Judge Withey, in his opinion in this case below, says:

"The lien upon the property of the company was effected by virtue of the statute upon the issue of the bonds by the State and their acceptance by the company. Unless an intention of the State Legislature to secure the purchaser of the bonds can be implied from the act and dealing of the parties, the claim of complainants to the relief asked in these suits rests upon a mere equity. There is no denial that it was the State of Tennessee which was invested with the lien, but it is said that she occupies the position of a surety, holding securities for the payment of the debt, which security the creditor — the bondholder — can, upon default of the principal debtor — the railroad company — avail himself in equity; that default by the company and by the State in the payment of the interest having occurred, the State becomes and is a trustee of this lien for the benefit of the bondholder. It was the State and the railroad company that dealt together in this matter. The State dictated the terms upon which it would grant aid, and the company accepted those terms without reference to what the purchaser of the bonds would say or claim. The bonds were loaned by the State and passed

over to the company, to be sold for money to aid or accommodate the company. The bonds were accepted by the company, upon the understanding and agreement, 1st, that the State was invested with a lien upon the company's railroad and property to secure the payment by said company of said bonds, with the interest thereon as the same became due. 2nd. That the interest should be paid by the company to the financial agent of the State at least fifteen days before it should become due, or satisfactory evidence be produced that it had been paid or provided for; and, 3rd, that the principal of the bonds should be paid by the company by means of a sinking fund in the State treasury, created by the purchase and deposit therein of Tennessee interest bearing bonds, supposed to be adequate for the purpose of enabling the State to meet its bonds at maturity.

"There is nothing in any of these stipulations out of which the relation of the State to the bondholder is changed from that of a principal debtor to a surety. Nor does it appear how the company becomes debtor to the bondholder in any degree whatever. There is no express promise on its part to the bondholder, nor is any contract relation implied between him and the company. Sec. 3 contains no language importing such promise. It declares merely that the State of Tennessee shall be invested with a lien for the payment of the bonds by the company. The State imposes the lien if its aid is accepted, and as a condition of the grant. The language may imply a promise by the company accepting the aid to pay the State, but there is no obligation of the company to pay the bondholder, resulting either from positive law, or from contract expressed or implied.

"The lien was clearly 'reserved in favor of the State.' It was the State of Tennessee that, upon the issuance of the bonds, was invested with the lien or mortgage, without deed. No other lien could have priority over or come in conflict with the lien of the State. The company was to deposit the interest money and exchange with the State's fiscal agent at least fifteen days before it became due, or satisfactory evidence that the interest had been paid or provided. All the suits and proceedings under the act are given as remedies exclusively to the State. The State might have a decree and sell the road for non-payment of any bond. The bond was made by the State for the accommodation of the railroad company, and was sold in open market without any promise by the company, other than what is implied to the State by accepting the benefit of the act.

"There is no express declaration of trust on the part of the State. It is sought to raise a trust out of the language of the act, and the principle is invoked applicable to a security given by a debtor to his surety, conditioned that it shall be void if the mortgagor pays the debt on which the mortgagee is surety, viz.: that in such case the mortgage will be held both as an indemnity to the surety and as a security for the debt, the surety being regarded in equity as trustee for the benefit of the creditor, and as having no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration without notice.

"The rule is not questioned. But it is not conceived that this rule would control the express terms of a mortgage or other instrument of security, nor render wholly nugatory the effect of an express reservation of a right of

disposition of the mortgaged property by the mortgagee, as is provided in the statute under consideration.

"It is not within the province of equity to import conditions into the mortgage. The conditions of this statutory lien were, that the company should deposit the interest money and exchange with the State's fiscal agent, or furnish evidence of their payment, and should also pay into the treasury the means of providing a sinking fund for the ultimate payment of the bonds. This dealing was to be with the State as to the payment of the principal; it must have been as to the payment of the interest, it was optional with the company, and there being no express covenant by the company, a compliance with the conditions named in the mortgage would discharge the lien.

"We do not overlook a claim made by one of complainant's counsel that the intention of the Legislature is to be ascertained by the language of the statute declaring the lien, but we think the statute must be construed together, and that the requirements put upon the mortgagor the conditions of his mortgage, when read in connection with the declaration, many times repeated in the statute, that the lien is the lien of the State, should have great weight in determining the legislative intention. The meaning of the legislation is to be declared from the words and subject matter of the statute. It is the scope and meaning of the whole enactment, rather than the literalism of words and phrases, that are to govern. The signification of the entire act, and not a single clause, determines the intention of the law-maker. Thus sec. 6 considered with other provisions of the act, is important as reserving to the State the right, through proceedings in court, to sell the road, thereby discharging it from the lien imposed by the statute.

"The fact that the State might discharge the lien in such way imports that there was no intention of the lawmakers to give a beneficial interest in the security to any one but the State. This view applies with peculiar force where the holder of the security is a State, not amenable to ordinary process of courts.

"This view of the effect of sec. 6 upon the construction as to the legislative intent is not weakened, but fortified by sec. 14." * * * * * "This section imports three things at least as to a sale: (1) a third person may be a purchaser; (2) the State may be the purchaser; (3) that the purchaser obtains a title discharged of the lien. It is manifest that if a stranger buys he takes title freed from all liens imposed by the act upon the property, and there is nothing in the language of the section or in the act to indicate that the State, becoming purchaser, is not equally free from such lien.

"The receiver appointed by the Governor is to take possession of the road and 'use the same as provided by the fifth section;' that is, in like manner, viz: 'run the same and manage the entire road.' This he is to do until the next meeting of the General Assembly, when by clear implication the future management or disposition of the road is left to legislative action.

"The contract between the State and the company is that the State shall have a lien 'for the payment by said company of said bonds,' but it is nowhere required by the State, and therefore not assented to by the company, that the latter shall pay *to the bondholder*. It was urged that this language imports payment by the company to the only person then entitled to ask or enforce it. The language must, however, be understood to relate to other

parts of the statute, which prescribes specifically the manner of payment by the company, viz.: payment annually into the State treasury of a sum to be employed as a sinking fund.

"It is made optional, by sec. 5, with the company whether it will deposit the interest as it becomes due with the fiscal agent of the State, or pay the same to the bondholder; and by section 7 the principal was to be paid by setting apart annually, after five years from the completion of the road, a certain percentum of the amount of bonds issued to the company, invested in any bonds of the State and assigned to the Governor. This sinking fund provision would, within the period which the bonds had to run, place in the treasury of the State an amount sufficient to nearly or quite enable the State to pay the bonds. The Tennessee bonds were generally 6 per cent., and funded in these the time required would be thirty-three years and four months.

"There is nothing in the act to indicate that after the company had complied with these provisions as to the interest and sinking fund, and has thus provided the State with the means of payment, that the company was also required to pay to the bondholders. Certainly this was not the condition of the security, as the only way in which a default could occur was by failure of the company to provide for payment of the interest and principal in those specified ways.

"But it is said the sinking fund was not to be commenced until five years after the particular road should be completed, and that that event might not take place at all, or not till half or more of the time which the bonds had to run had expired, so that the period might be wholly

inadequate in which to provide a sufficient sinking fund for paying the bonds when due, and that this indicates that the lien was not intended as security merely for payment by the company to the State by means of a sinking fund in the manner provided. A statute must be construed from the standpoint, the circumstances and surroundings of the law-makers, when it was enacted; and it would be unjust and repugnant to reason and common experience to assume that the Legislature passed the act in the expectation that the roads would never be finished, or would not be completed within a reasonable time. Besides, sec. 12 reserved to the State ample powers to make such modifications in relation to the time for the sinking fund to commence, and the per cent. annually to be paid into that fund, as would freely protect the interest of the State against delay on the part of the railroad company.

"Whatever might be said in regard to the evidence adduced in these cases of contemporaneous construction, through the utterances of State officials in public documents, the action of any department of the State government or otherwise, there is, in the judgment of the court, nothing to change the views which have been expressed.

"Chamberlain v. St. P. & S. C. R. R. Co., 92 U. S. 299, was decided upon a statute and upon facts similar to those in the present case, and is very instructive. The State of Minnesota, by a constitutional amendment, provided for an issue of its bonds as a loan to the Southern Minnesota Railroad Company, and required such company to convey the lands in question 'in trust for the better security of the treasury of the State from loss on said bonds,' and further provided that if the borrowing company should make default in payment of either the principal or interest of the

bonds issued by the State, the Governor should proceed to sell the lands held in trust by the State. The company accordingly executed a trust conveyance of the lands to the State, conditioned for the payment of the principal and interest of the bonds issued to that company. The company made default in the payment of interest. The State foreclosed and became the purchaser of the lands, which she granted to another corporation, the defendant in the Chamberlain suit. Chamberlain was holder of some of the State bonds, the payment of which was secured by the trust conveyance, and sought to have a lien upon the land declared in his favor.

"In the case at bar, as in that case, the State was primarily liable to the holder of the bonds. In the case at bar, as in that case, the State reserved to itself the right of foreclosure and disposition of the property. * * *

"Such was said to be the law of that case, even if the bondholders could have called upon the company for payment. But laying this feature aside, the analogies are as before stated, and whatever right the plaintiffs have to claim benefit from the security rests here, as in that case, as a mere equity. There was no legal right, because the law did not impose one, and the company made no promise to the bondholder. Such equity created no lien which followed the property; the liability of the State was to the bondholder. She held no relation as surety to him; as in the Chamberlain case, it was only as between her and the company that in any possible view the State could be regarded as surety; and this view would make it necessary to treat the company as the principal debtor to the bondholder, whereas the company was not the principal debtor, nor, indeed, a debtor to the bondholder in any degree. The

reasoning in the case of Hand v. Railroad Co. in the Supreme Court of South Carolina, referred to in the argument, cannot all be adopted as applicable to these cases, if the conclusions might be.

"It is not upon its face authority. The railroad company made its own bonds, and the State guaranteed their payment to the holder by indorsement. The State was secured by a lien upon the company's road reserved by the State, which authorized the guaranty. As a surety the State assumed contract obligations to the creditor, the bondholder. If a creditor has a right to claim the benefit of security given by the debtor to his surety for the latter's indemnity, it does not follow that the right exists where the principal debtor takes the security from the accommodatee, and where the security holder holds no other relation to the creditor than that of debtor, and the giver of the security is neither a debtor nor surety to the creditor."

Record p.

3 Federal Reporter 673.

In accord with this view is the case in 91 U. S., before cited herein.

Union Pacific R. R. v. U. S., 90 Otto 308. Opinion by Mr. Justice Bradley.

The provisions of the act of Congress under review there, in its terms, are very much like our act. There, bonds of the United States for $1000 were issued, sixteen bonds a mile for sections of forty miles. The issue of said bonds constituted a first mortgage on the road. These liens are construed to be in favor of the Government.

Maryland v. Railroad, 22 Wall. 105.

In this case the State of Maryland loaned its bonds to the Baltimore & Ohio Railroad Company. The company gave a mortgage to secure the loans. One of the conditions was to pay the interest ninety days before that of the State was due. The court held it a stipulation of *indemnity.*

Branch v. Macon & Brunswick R. R. Co., 2 Wood C. C. R. 388. Opinion by Mr. Justice Bradley.

In this case the State of Georgia indorsed the bonds of the railroad company, at so many thousand dollars a mile, on condition the road was free from liens and that the indorsement should vest the title to the property in the State. In this case a holder of the bonds claimed the lien.

The court say:

"The security is for the indemnity of the State."

Other cases could be cited, but it seems unnecessary.

The main case relied on by the appellants is Hand v. R. R. Co. The very marked distinction between that case and the one at bar is, that there the bonds were the bonds of the railroad company, endorsed by the State, making, as we submit, all the difference in the world.

Tompkins v. Little Rock & Ft. S. Ry., 18 Fed. R. 344.

This case, too, is much relied on by our friends as sustaining their view. All we can say in reply is to submit what Mr. Justice Miller says. We construe it in our favor. He says:

"The suits were brought by the holders of bonds issued to the defendant railroad companies, or to their predeces-

sors which had received the bonds, by the State of Arkansas. The bonds are without the indorsement of the companies, and if they are responsible for their payment, as the plaintiffs assert in their bills, that responsibility must arise out of some other matter connected with their acceptance and sale of them to the present holders or their privies.

"The form of the bond is,

"*United States of America.*

"The State of Arkansas is indebted unto the Little Rock & Fort Smith Railroad Company, or bearer, in the sum of $1000; due in thirty years, with 7 per cent. interest per annum, payable semi-annually, in the city of New York. The faith and credit of the State were pledged in terms on the bonds for the payment of interest and principal, and referred on their face to the act under which they were issued."

Mr. Justice Miller then says:

"It is clear enough that there is in the bonds themselves with no indorsement nothing which binds the companies that received and sold them to pay either the principal or interest.

After an elaborate opinion, Mr. Justice Miller says:

"The true doctrine governing the present case is laid down in Chamberlain v. St. Paul R. Co., 92 U. S. 290."

Our friends spend much of their brief in arguing the proposition of the right of a creditor to the benefit of a security given by his debtor to a surety for the latter's indemnity. We answer this as Mr. Justice Bradley did, in 92 U. S. 306, and as Judge Withey did in this case. We

do not question the general doctrine, but as he said, in this case we submit the lien given the State was not intended to create a trust in favor of the holders of her own bonds.

II.

CONTEMPORANEOUS AND PRACTICAL CONSTRUCTION.

We next submit that the contemporaneous and practical construction of this statute invariably given it by the Legislature, by the State officials, by the railroad companies, and by the holders of these bonds of the State of Tennessee, and these complainants in particular, from the date of the passage of the original act February 11, 1852, down to the bringing of this suit, February, 1879, over a quarter of a century, is as we insist, and this interpretation is the proper guide to its meaning, and is of controlling influence and of more importance than the mere abstract meaning of the phraseology.

The State has uniformly construed it to be a debt from her to the holders of her bonds, and the debt from the railroad company as belonging alone and absolutely to her.

This is shown from the fact that in sec. 12 she reserves to herself the right to enact such other laws in regard thereto as she may see proper.

This is done from 1852 to 1873, publicly and notoriously, without objection from any one, and the Legislature at nearly every session altered and changed this contract to suit the State and only consulted the company.

The company have always construed it as its debt to the State alone.

This is shown by the manner it has dealt with the bonds and interest and sinking fund. It has always recognized the changes in the statute as made by the Legislature and acted in conformity thereto.

The bondholders, and these complainants in particular, have always construed their debt as due by the State alone.

This is shown by their acquiescence in the changes of the contract as made by the Legislature, in funding any past due bonds and coupons, and in demanding their interest of the State alone. And, particularly, of their action under the act of 1873, in funding all their past due coupons and in registering in person all their bonds.

See Geddes' dep., R. p. 629.

Thereby recognizing the claim of the State and the company, that the debt of the company was that of the State alone, and the debt on the bonds to the holder was that of the State alone, and thus making a new contract, taking the State as their sole debtor, if it was ever otherwise.

The bonds of the State at this time were down to 40 or 50 cents on the dollar. Can any one believe that the bondholder would have taken 50 cents on the dollar for this claim and release a railroad company, if he had any claim on it?

With the State defaulting from 1865 to 1879, when these suits were brought, the railroad companies defaulting during same time, and the bondholders time and again funding their unpaid bonds and coupons with the State on her own terms, can any one believe they ever dreamed of any liability of the railroad company?

Is it not the simple truth that these suits are only to scheme and speculate on what they know to be the property and money of another?

Irwin v. U. S., 16 How. 513.

"If the deed were ambiguous and capable of a construction which would permit one party to overreach and defraud the other, * * * we have a practical construction of the vendors, made on the ground and acquiesced in for sixteen years. It is conclusive.

"Where there is doubt as to the proper construction of an instrument, its practical construction by the parties is entitled to great consideration."

10 Wallace 377.

Chicago v. Sheldon, 9 Wall. 50.

"But in an executory contract, where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no danger in the adoption of it by the court."

"From all the acts done, and all the circumstances surrounding or attendant on the acts done, in regard to the dissolution and selling or winding up of the old firm, inferences may be drawn showing the meaning practically which the partners had when the notice was given, and their intention when it was drawn. This practical construction given by the parties themselves is a proper guide to its meaning, and is of more importance than what is the abstract meaning which the court may attach to its mere phraseology. The business of a court and jury is to ascertain the meaning and intention of parties in making an agreement, and to carry that into effect, if it is consistent with law. I know of no better mode of ascertaining this meaning than is shown if all parties acted on a particular meaning." 25 Mo. 21.

Gaslight Co. v. City of St. Louis, 46 Mo. 127.

"If the court leaves the parties to be governed by their own understanding of their own language, it in effect enforces the contract as actually made. That they should be so permitted to construe their own agreement, accords with every principle of reason and justice. The continuous conduct of the parties for a series of years concerning the subject matter of the contract, and in fulfillment of its conditions, every act pointing in the same direction, may make their understanding as clear as by the greatest precision of language."

Breedlove v. Stump, 3 Yer. 265.

"If the meaning were in any respect doubtful, the parties themselves have placed a construction upon the instrument by their acts, as well as words, which I do not feel at liberty to disregard."

Edwards v. Darby, 12 Wheat. 210.

"In the construction of a doubtful and ambiguous law, the contemporaneous and practical construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect. The law was not only so construed by the commissioners, but the construction seems to have received, very shortly after, the sanction of the Legislature."

U. S. v. The Ship Recorder, 1 Blatchford 218.

"We hold the Government, if not all the parties, to be now precluded by that long usage and practical construction of the law, from questioning its convictions, and dis-

turbing the course of its execution; and admitting that, on the face of the act, it is doubtful whether the trade now attempted to be prosecuted can be allowed, or even conceding that the intention of the statute to the contrary is manifest, and that the treasury department misapprehended and misinterpreted its provisions in the instructions of September, 1817, we think the settled rules of law, and the principles governing the interpretation of human language, with whatever solemnity and to whatever purpose it is employed, requires us to adopt and adhere to the contemporaneous construction, corroborated by an undeviating usage of thirty years, as that which must be applied to the statute and govern the case. The Supreme Court of the United States has given the most solemn sanction to the doctrine, in declaring that a contemporary exposition of the constitution, practiced and acquiesced in for a period of years, fixes its construction."

The Supreme Court of Massachusetts, in a case maturely considered, held that a contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms made use of by the Legislature. If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the Legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law.

17 Mass. 144.

III.

ESTOPPEL — LACHES.

Chamberlain v. St. Paul, &c., R. R., 2 Otto 306.

Says Mr. Justice Bradley :

" But aside from this consideration, which of itself is a sufficient answer to the present suit, the long delay of the complainant in asserting any claim to the lands in controversy, whilst the defendants were constructing, at a vast expenditure of labor and money, their railroads, deprives his suit of favorable consideration. It does not appear that for twelve years after the abandonment of the work by the original Minnesota Company on the roads, the grading of which it commenced, he set up any claim, such as is advanced in this suit; on the contrary it is abundantly established that in various ways he urged upon members of the Legislature the adoption of measures for the construction of the roads, which involved an appropriation by the State for that purpose of the lands in controversy, and that after the new companies were organized and the lands were granted to them, he urged them to proceed with the enterprises, knowing that upon those lands they relied to carry on the work. Under these circumstances it would be manifestly inequitable and unjust to grant his prayer."

We scarcely think the court in determining the case at bar will have to pass beyond the construction of the statute.

It seems to us so simple and plain. The court below concurred with us in this view.

And on authority it has been so often and so well settled that we think there can be no doubt about it.

But if there is, does not the practical construction given the statute by all the parties for over a quarter of a century settle it?

And if this does not do so, surely the last proposition advanced by Mr. Justice Bradley in the Chamberlain case does.

Because, from the record the court, in the case at bar, will find abundant proof showing that the holders of these bonds, and the complainants in particular, by letters, by telegrams and by personal interview, urged upon the Legislature, the State and the railroad officials, to make the very settlement they now complain of. Not only so, but they knew that the private persons who they were urging to go into this matter, were placing their money in it, relying upon the validity of the very settlements that these very claimants Stevens, Geddes and others represented as being unquestioned and for the good of all.

And it is only necessary to point the court to this single fact to settle the case.

The State, we submit, is an indispensable party to this suit, if appellants are right in their view. It is not amenable to courts, and this being so, the case must be dismissed.

A further proposition, which we simply submit to the court, is the want of privity of contract between the holders of the bonds of the State of Tennessee and the railroad companies.

"The general rule is that privity of contract *must exist* between the party suing and the party sued."

National Bank v. Grand Lodge, 98 U. S. 123.

"Where there is no express stipulation there is no liability beyond this."

Otis v. Collum, 92 U. S. 447.

And without further comment we respectfully submit our case.

L. W. HUMES,

Of Counsel for the M. & C. R. R. Co. et al.

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Stipulation as to Foreclosure Record.

It is stipulated and agreed, in the cases of Stevens *v.* McMinnville & Manchester Railroad Co., and same *v.* Winchester & Alabama Railroad Co., that the State of Tennessee filed one bill at Nashville against all the defaulting railroads, and that these two companies were among the defendants, and that the bill is the same as that against the Edgefield & Kentucky Railroad Co., set out in 2
record, and the Nashville & Northwestern Railroad Co., set out in the record of the latter case.

It is further stipulated that each of the foregoing corporations, viz., McMinnville & Manchester and Winchester & Alabama, were made parties to said bill, and was executed with process and copy bill. And the following stockholders in the McMinnville & Manchester Railroad Co., were made parties and executed with process and copy bill, viz., P. H. Marbury, W. P. Hickerson, Jas. P. Thompson, L. 3
D. Hickerson, Wm. Moore and Matt Smartt, and the Nashville & Chattanooga Railroad Company as the holder of $34,000 coupons taken from issued bonds issued by the McMinnville & Manchester Railroad Company. And the following stockholders in the Winchester & Alabama Railroad Company were made parties and executed with process and copy bill, viz., Mayor and City Council of Nashville and John Frizzell. And the companies and stockholders made defence in each case by demur- 4
rer and answer; that the said publications were made for non-resident and unknown parties de-

5 scribed and mentioned in the bill of the State of Tennessee, and upon the failure of such to plead, answer or demur, this bill was taken as confessed as to them.

That upon the hearing of the causes in the Chancery Court, the Court decreed a lien in favor of the State; also decreed the Master to state an account of the amount due the State from each of said railroad companies, and he did so and reported that there was due the State for bonds of the State ad-
6 vanced to the McMinnville & Manchester Railroad Company, under the Internal Improvement Acts, after deducting all credits, one million and ninety-nine thousand five hundred and seventy-eight dollars, including interests to date of account.

He reported that there was due the State from the Winchester & Alabama Railroad Company one million seven hundred and ninety thousand five hundred and thirty-six dollars and seventy cents, after allowing all credits.

7 It is further stipulated that the Court decreed a sale of said roads' property and franchises, and that each was sold to the Memphis & Charleston Railroad Co., and subsequently sold by that Company to the Nashville, Chattanooga & St. Louis Railway, and that the Court confirmed the sales and gave a decree vesting the titles in the purchasers.

It is further agreed that the said proceedings were ordered by the State by the following acts of
8 the Legislature, viz.: 12th section of the Act of 1851-2; of July 1, 1870; Dec. 27, 1870, and Nov. 17, 1871; each of which Acts are set out in the Record. And that the publications for non-resident and unknown defendants described in said bill was made and had under the Code of Tennessee, section 4311, under the title of the "Jurisdiction of the Court of Chancery, Sec. 1."

"The bill may be filed in the Chancery District in which the defendant or a material defendant resides; and if upon inquiry at his residence he is not to be found, he may be proceeded against by publication or judicial attachment as herein provided." Sub-section 4: "Bills against non-residents or persons "whose names or residences are unknown may be "filed in the district in which the cause of action "arose, or the act in which the suit is judicated was "to be performed, or in which the subject of the "suit or any material part thereof is" and is claimed, as well as under the general powers of a Court of Chancery.

EAST & FOGG,
Atty. Defendants.

E. L. ANDREWS,
Atty., Sol'r for Complts.

114-663

Supreme Court of the United States.

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY, PETER GEDDES, &c.,

vs.

THE MEMPHIS AND CHARLESTON R. R. CO., and other Railroad Companies in the State of Tennessee.

Memorandum of Changes in the General Internal Improvement Law of February 11, 1852, *which Mr. Southmayd's Argument would render necessary.*

Section 3.

1. *Omit*—"They shall constitute a lien upon said section," &c., &c.

2. *Change*—"For the payment by said company of said bonds, with the interest thereon, as the same becomes due,"

So that it shall read—"For the payment by said company to the Bank of Tennessee, at Nashville, for the State, of amounts equal to the interest upon said bonds, fifteen days before the maturity of the interest payable by the State upon said bonds, as in the *fifth* section hereof provided, and for the payment to the State by instalments of an amount equal to the principal of said bonds as hereinafter

in the *seventh* section hereof provided, and of any unpaid residue of amounts equal to the principal of such bonds at the time of the maturity thereof."

Section 4.

1. *Change*—"For the payment of said bonds and the accruing interest thereon"—

So that it shall read, "For the payment to the State of an amount equal to the principal and interest of said bonds in the manner and at the times provided for in the *third* section of this act."

2. *Change*—"For the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds"—

So that it shall read, "For the payment to the State of an amount equal to the principal and interest of all said bonds at the times and in the manner hereinbefore provided."

Section 5.

1. *Change*—"To deposit in the Bank of Tennessee, at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, an amount sufficient to pay said interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for, and if said company fail to deposit said interest as aforesaid"—

So that it shall read, "To pay to the Bank of Tennessee, at Nashville, for the State, at least fifteen days before the interest upon the State bonds is payable by the

State, of an amount equal to such interest with exchange and commissions equal to an amount necessarily payable by the State for exchange and commissions in making payment of the interest upon the State bonds, or satisfactory evidence that the interest payable by the State has been paid or provided for, and if said company fail to pay said amount, or furnish the evidence aforesaid."

2. *Omit*—"And pay over the same under the direction of the Governor, towards the liquidation of such unpaid interest."

3. *Change*—"To pay off and discharge the interest aforesaid due on said bonds,"

So that it shall read, "To pay off and discharge the amounts so as aforesaid payable by the company to the State."

4. *Omit*—"As may not be provided for by the company."

Section 6.

1. *Change*—"Any of said bonds, when they fall due,"

So that it shall read, "Any of said amounts of principal payable by said company to the State, as herein provided."

2. *Change*—"To secure the payment of said bonds with the interest thereon,"

So that it shall read, "To secure the payment to the State of the residue remaining unpaid of the amounts made payable by the *fifth* and *seventh* sections of this act, to the State of Tennessee."

Section 7.

1. *Change*—"At the end of five years after the completion of said road,"

So that it shall read, "At the end of five years after the issuance of said bonds."

2. *Omit*—"And as between the State and said company,"
3. *Omit*—"as a sinking fund,"

Or insert—"for the sole benefitof the State."

Section 13.

1. *Omit*—"Creating a sinking-fund."

   Or insert—"For the sole benefit of the State."

2. *Change*—"And the stockholders thereof shall be individually liable for the payment of the bonds so fraudulently obtained by said company,"

   So that it shall read—"And the stockholders thereof shall be individually liable for the immediate payment to the State of amounts equal to the principal and interest of said bonds, after deducting the net proceeds of said sale, which sums so collected from said stockholders, shall likewise be vested by the Comptroller in stocks, as provided for in the *seventh* section of this act."

We respectfully submit that an argument, which requires such radical changes in the letter of a statute, the meaning of which without the changes is plain and explicit, cannot be sound.

GEO. HOADLY,
JOHN C. F. GARDNER,
Of Counsel for Appellants.

114-663

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 53.

CALVIN AMORY STEVENS, on behalf of the holders of Internal Improvement Bonds of Tennessee issued to the Knoxville and Kentucky Railroad Company,

vs.

THE KNOXVILLE AND KENTUCKY RAILROAD COMPANY *et al.*

The appellees move the Court to dismiss the appeal in this cause, for the reason that the amount in controversy, exclusive of costs, does not exceed the sum of five thousand dollars. The amount involved, in fact, is less than fifteen hundred dollars.

Transcript, p. 17.

Schwed *vs.* Smith, 106 U. S., 188.

WM. M. BAXTER,
Of Counsel for Appellees.